

**A FROZEN DEBATE: FINDING AN ETHICAL SOLUTION FOR THE REGULATION
OF EMBRYO DONATION**

By

Claire Irving Horner

B.A., Franciscan University of Steubenville, 2008

Submitted to the Graduate Faculty of
The School of Arts & Sciences in partial fulfillment
of the requirements for the degree of
Master of Arts in Bioethics

University of Pittsburgh

2011

UNIVERSITY OF PITTSBURGH
SCHOOL OF ARTS & SCIENCES

This thesis was presented

by

Claire Irving Horner

It was defended on

April 18, 2011

and approved by

Lisa Parker, PhD, Associate Professor and Director of the Master of Arts Program in Bioethics,
Center for Bioethics and Health Law

Alan Meisel, J.D., Professor of Law, School of Law

Amy VanDyke, MSW, LSW, PhDc, Clinical Ethics Fellow, Health Care Ethics Department,
McAnulty School, Duquesne University

Thesis Advisor: Valerie Satkoske, PhD, Affiliate Faculty, Center for Bioethics and Health Law

Copyright © by Claire Irving Horner
2011

A FROZEN DEBATE: FINDING AN ETHICAL SOLUTION TO THE REGULATION OF EMBRYO DONATION

Claire Irving Horner, M.A.

University of Pittsburgh, 2011

It is estimated that over 400,000 embryos are currently cryopreserved in the United States, and many of these will never be used by their creators. Although many options exist for the disposition of unwanted embryos, such as donation to research or destruction, one option, embryo donation to another individual for implantation, has met with resistance from some religious institutions such as the Catholic Church, and remains largely unregulated in American law. This practice, which offers the possibility of life for the embryo and the possibility of parenthood for the recipient, should be morally acceptable in the Catholic tradition and properly regulated by legislatures.

This paper argues that the current contract law approach to embryo donation is not sufficient to ensure permanence of the agreement, and the practice is not intrinsically unethical based on principles of Catholic bioethics. This thesis proposes that reconceptualizing the practice of embryo donation as embryo adoption can resolve both the legal insufficiencies and the Catholic ethical concerns. Approaching embryo donation within an adoption framework definitively establishes the allocation of parental rights and provides them with judicial support. Viewing the practice as a form of adoption instead of a reproductive technology also avoids a violation of Catholic moral principles and establishes embryo donation as an ethical option for those wishing to adopt abandoned embryos.

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	vi
I. INTRODUCTION	1
II. CONTRACT LAW AND THE EMBRYO	5
A. HISTORY OF REPRODUCTIVE RIGHTS	5
B. FETAL PERSONHOOD IN THE LAW	7
C. LEGAL DISPOSITION OF CRYOPRESERVED EMBRYOS	8
1. Constitutional Rights Approach	10
2. Contract Approach.....	15
3. Contemporaneous Mutual Consent Approach.....	18
D. EMBRYO DONATION IN THE LAW	19
1. Current Legislative Approaches	20
2. The Legal Insufficiency of Contract Law	22
3. The Subject of Contracts	23
III. CATHOLIC PERSPECTIVES ON EMBRYO DONATION	28
A. IN VITRO FERTILIZATION	31
B. GESTATIONAL SURROGACY	32
C. THE EMBRYO DONATION DEBATE	32
1. It is Like IVF	33
2. The Church has Already Condemned the Practice	35
3. Embryo Transfer is Intrinsically Immoral	37
4. Those Who Engage in Embryo Donation are Complicit in IVF	41
D. THE EMBRYO IS A CHILD.....	43
IV. THE ADOPTION SOLUTION	48
A. EMBRYO ADOPTION IN THE LAW	49
1. Protects Interests by Providing Permanence	50
2. Does Not Affect Reproductive Rights	56
B. EMBRYO ADOPTION IN THE CHURCH	59
1. Ethical Analogy to Born Adoption	59
C. SHORTCOMINGS OF THE ADOPTION APPROACH	61
1. Legal Implications	62
2. Catholic Considerations.....	64
V. CONCLUSION	66
BIBLIOGRAPHY	67

ACKNOWLEDGEMENTS

First and foremost, I would like to thank my thesis advisor, Valerie Satkoske, for her guidance, wisdom, and patience throughout the development of this project. She has been a source of support and encouragement, and has been instrumental in the transformation of an interest in several aspects of embryo adoption into a cohesive and focused thesis. I am grateful to Lisa Parker as well, whose input throughout this Master's program and especially during the course of writing this thesis helped me to clarify my arguments and become a better writer. I also wish to thank Amy VanDyke and Alan Meisel, who contributed valuable insights from their respective areas of expertise. Finally, I am deeply grateful for the love and support of my husband, Kevin, whose help and encouragement have been my strength.

I. INTRODUCTION

It is estimated that over 400,000 embryos are currently cryopreserved in the United States.¹ Although 90% are classified as “in use” by the couples that produced them, far fewer of these embryos will ever actually be used by those couples.² When I first heard these statistics in a college course that taught Catholic reproductive ethics, I was told that according to current Catholic doctrine, despite the high number of frozen abandoned embryos, there were no ethically permissible options for implanting, disposing, or otherwise taking them out of their cryopreserved state. Not satisfied with that answer, I made it a priority to use my education in bioethics, law and theology to solve the puzzle. What should a pluralistic society consider when determining the proper disposition of abandoned embryos?

This question exists, in part, because of the ongoing public debate regarding personhood and the beginning of life, as well as the nature of the IVF process, which often results in a large number of excess embryos. The American Society for Reproductive Medicine has issued guidelines for the practice of IVF that call for the transfer of one to five embryos per cycle, depending on the woman’s age and prognosis.³ Since up to 20 eggs can be extracted during egg retrieval surgery, and clinicians fertilize as many of them as possible, often more of these eggs

¹ See Sarah-Vaughan Brakman and Darlene Fozard Weaver, “Introduction: The Ethics of Embryo Adoption and the Catholic Tradition,” in *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, eds. Sarah-Vaughan Brakman and Darlene Fozard Weaver (Springer Science + Business Media B.V., 2007), 4.

² Ibid.

³ American Society for Reproductive Medicine, “Guidelines on Number of Embryos Transferred,” *Fertility and Sterility* 92, no. 5 (November 2009): 1518-19.

are fertilized than will be implanted in one cycle.⁴ For those who contracted to have the embryos created, several options exist for the remaining embryos. These spare embryos may be kept for future use by those who commissioned the embryos, destroyed, donated for research purposes, or donated to other people who wish to implant, gestate and raise a child as their own. For many of those who believe that life begins at conception, the high number of unwanted frozen embryos is ethically unsettling, and they would embrace scientific and regulatory options that avoid the destruction of embryos. Currently in the United States, however, there is no settled opinion on the donation of embryos to others who wish to have a child, and no consistent regulations exist to define and oversee the process.

In the search for an ethical solution to the problem of unwanted embryos, there are at least two prominent social institutions that may provide insight on a resolution: the American legal system and the Roman Catholic Church. Lawmakers are in a position to craft regulations on reproductive technologies that may, in turn, shape public perception of the issue. So far, many states have drawn on contract and property law to govern the practice of embryo donation, but these frameworks may not afford a realistic long-term solution to such regulation. The Catholic Church, which has long been a prominent voice in bioethical debates, is struggling to determine its own teaching on embryo donation because the Church has deemed illicit many of the proposed solutions to the surplus of frozen embryos.

To provide clarity within this discussion, and because there is no consistent language or terminology used to describe many aspects of reproductive technologies, it is necessary to provide a definition of terms. Most importantly, while certain rights of personhood can be artificially bestowed on an entity by statute, as with corporations, for purposes of this project, the

⁴ Brakman and Weaver, 4

legal status of “personhood” refers to the rights currently conferred on natural persons born in the United States. The term embryo will be used to describe a fertilized egg from the moment of conception through the 8th week of gestation, which includes the stage at which it may be cryogenically preserved outside of the uterus. For purposes of this paper, it is assumed that the adopting couple is heterosexual and married to minimize complications in the development of the argument for embryo adoption. Furthermore, because it is possible that the embryos are the genetic product of either the couple themselves or donor gametes, the couple that commissioned the creation of the embryos will be referred to as custodians.⁵ The woman who carries the embryo will be referred to as the gestational mother, while the man and woman who intend to parent the child will be referred to as the intended parents. In many cases in the use of reproductive technologies, the gestational and intended mother will be the same individual. Those who contributed gametes to an embryo will be called genetic parents; the term parent is used in this case to connote genetic parenthood, but not social parenthood, and is not intended to imply the personhood of an embryo.

Chapter one addresses the current contract-based approach to embryo donation under current legal regulations and argues that this approach is not sufficient to effect the permanent transfer of parental rights necessary for the practice. Chapter two examines the arguments both for and against embryo donation posed within the Catholic bioethical tradition, and demonstrates how embryo donation may fit within the ethical framework of the Church. Finally, chapter three argues that approaching this practice as embryo adoption will satisfy the legal insufficiencies of contract law and provide a basis for moral permissibility within Catholic teaching. It is through an analogy to the current adoption framework that this particular option for the disposition of

⁵ Custodian legally refers to a person that has custody of either a child or property, and is not meant to imply that the embryo is a child. *Black’s Law Dictionary* 9th ed.

unwanted frozen embryos can be both permissible and properly regulated, ensuring the protection of the interests of those wishing to donate or adopt one of these embryos.

II. CONTRACT LAW AND THE EMBRYO

In the United States, an embryo or fetus does not have the status of a person under the United States Constitution until the moment of birth. Decades of reproductive rights cases have established that although an embryo or fetus in utero is not a person, the state still has an interest in protecting that “potential life” in later stages of the pregnancy and may enact laws and regulations that protect this interest as long as they do not impose an undue burden on a woman seeking an abortion.⁶

A. HISTORY OF REPRODUCTIVE RIGHTS

The 1973 landmark case of *Roe v. Wade* held that abortion falls under a woman’s Constitutionally protected right to privacy, and is therefore a legal practice.⁷ The Supreme Court based this decision on the conclusion that a fetus is not a person entitled to legal rights; however, this conclusion was qualified by the Court’s recognition of a growing state interest in the “potential life” of the fetus as the pregnancy progresses.⁸ In this case, the state argued that the fetus was a person entitled to Constitutional protection, while the petitioner contended that abortion is an issue of bodily privacy, over which the state should have little control.⁹ Although

⁶ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

⁷ *Roe v. Wade*, 410 U.S. 113 (1973).

⁸ *Ibid.*, 164-66.

⁹ *Ibid.*, 162-64.

the Court found that the fetus is not legally a person, it attempted to reconcile the competing interests of the state and the woman seeking an abortion by establishing a sliding scale of state control based on pregnancy trimesters.¹⁰ Although this trimester system was discarded by the Court in *Planned Parenthood v. Casey* in 1992, the central ruling, which survived *Casey*, is that the state may only place restrictions on access to abortion that are proportionate to the growing interest in the fetal life.¹¹

In *Casey*, the Court determined that trimesters were no longer useful to determine the guideline for the degree of state interference that should be allowed with those seeking an abortion because medico-scientific advances made it possible for fetal viability, the ability of a fetus to survive outside of the womb, to be achieved earlier than the start of the third trimester.¹² Maintaining its position that the state has an increasing interest in the “potential life” of the fetus even though rights associated with personhood are not conferred until birth, the Court determined that a better test for appropriate state restrictions on access to abortion was the “undue burden” test, which allows for regulations that restrict or otherwise affect abortions as long as they do not impose an undue burden on the woman seeking an abortion.¹³ Regulations are considered to present an undue burden if they have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹⁴ Just as the Court in *Roe* recognized the highest state interest in fetal life in the third trimester, the *Casey* Court recognized a more expansive state interest in protecting fetal life throughout pregnancy, but most of all after viability.¹⁵

¹⁰ Ibid.

¹¹ *Roe v. Wade*, 165-66.

¹² *Planned Parenthood v. Casey*, 860.

¹³ Ibid., 873-74.

¹⁴ Ibid., 877.

¹⁵ Ibid., 879.

B. FETAL PERSONHOOD IN THE LAW

The abortion cases before the Supreme Court have conferred immunity from prosecution on a physician who terminates the life of a fetus with the consent of the pregnant woman within certain regulatory limitations. Although the fetus does not have the permanent legal status of a person, as those who are born do, state laws sometimes treat the fetus as a person for certain limited purposes, conferring upon it certain rights and protections usually reserved for born human beings. The California Penal Code, for example, defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.”¹⁶ This statute provides explicit exceptions for abortions to which the woman consents, but otherwise does not qualify the definition of the crime. While the fetus is not included in the definition of a person, it is nevertheless treated as a person for purposes of prosecuting an individual for murder in contexts other than abortion.

Minnesota’s penal code contains a separate crime entitled “murder of unborn child in the first degree.”¹⁷ This crime carries with it the punishment of imprisonment for life if the defendant is convicted of “caus[ing] the death of an unborn child with premeditation and with intent to effect the death of the unborn child or of another,” as well as causing the death of the unborn child in the course of committing criminal sexual conduct or other crimes of aggression.¹⁸ The explanatory notes in this statute explain that this crime is not void for vagueness for failing

¹⁶ *West’s Annotated California Penal Code*, sec. 187 (2008).

¹⁷ *Minnesota Annotated Statutes*, sec. 609.2661 (2010).

¹⁸ *Minnesota Annotated Statutes*, sec. 609.2661 (2010). A defendant is “guilty of murder of an unborn child in the first degree...[if he or she] causes the death of an unborn child...while committing or attempting to commit burglary, aggravated robbery, kidnapping, arson in the first or second degree, tampering with a witness in the first degree, or escape from custody.”

to distinguish between a viable fetus and a non-viable embryo or fetus.¹⁹ Both are protected under this statute.

In Idaho, the crime of aggravated battery includes an act of battery “Upon the person of a pregnant female, [which] causes great bodily harm, permanent disability or permanent disfigurement to an embryo or fetus.”²⁰ Although this section provides an explicit exclusion for authorized abortions, if another person injures the embryo or fetus without the woman’s consent, that person is subject to the same prosecution as for a crime against a born person.²¹ Likewise, Mississippi specifies that the term “human being” includes an “unborn child” from conception until birth with respect to several criminal offenses, such as capital murder and homicide while committing a felony, explicitly excluding legal abortions.²²

C. LEGAL DISPOSITION OF CRYOPRESERVED EMBRYOS

The cases establishing reproductive rights provide the backdrop for current legal challenges regarding reproductive technologies, such as determining dispositions of embryos when the custodians disagree or the question of parental rights in gestational surrogacy arrangements. While the legal system does not confer full personhood and Constitutional protection on a fetus until it is born, it does recognize a heightened state interest in the developing fetus. While this thesis does not address the question of when human life and personhood begin, it is important to understand the role of this debate as well as the current legal landscape in reproductive rights on the issue of disposition of frozen embryos.

¹⁹ Ibid.

²⁰ *Idaho Code Statutes Annotated*, sec. 18-907 (2011).

²¹ Ibid.

²² *Mississippi Laws*, sec. 97-3-37 (West 2011).

The non-person status of a fetus has been uniformly applied to cases involving many reproductive technologies with little difficulty. However, in the case of embryo donation, where the human embryo is no longer the subject inside of a woman's body, but a separately existing entity, the traditional person/non-person delineation – depending as it does on a woman's bodily privacy – has broken down. Unlike abortion, which relies heavily on the interest of the pregnant woman, embryo adoption eliminates this competing factor. Here, courts struggle to determine the correct legal analysis to apply to transfers of or disputes over cryopreserved embryos because, although it is clear that the embryo is not a legal person, it is not as clear that the embryo has the legal status of property.

Courts have applied three different approaches to disputes over the disposition of embryos in divorce to determine the legal status of the embryo and, consequently, the rights of the custodians and the protections accorded to the embryo: the constitutional rights approach, the contract approach, and the contemporaneous mutual consent approach. Although each approach addresses some of the important considerations arising in these kinds of disputes, none of them comprehensively considers all of the interests involved. These varied and inconsistently applied approaches create confusion not only for custodians of embryos, but also for courts responsible for resolving these disputes. If certainty of custody of embryos in divorce is unsettled and unpredictable, using the same approaches for embryo donation may create similar or greater uncertainty about the rightful custodian of embryos and the resulting children when third parties with competing claims are involved.

1. Constitutional Rights Approach

An explanation of the legal confusion over the status of a cryopreserved embryo is found in *Davis v. Davis*, a 1992 case involving a dispute over embryos belonging to a divorcing couple.²³ When Junior and Mary Sue Davis agreed to undergo IVF with their own gametes, they did not sign an agreement beforehand indicating what should happen to any spare embryos they might have if they divorced.²⁴ When their marriage ended with seven embryos still in storage, Mary Sue wished to donate the embryos to another couple, while Junior asked that they be discarded.²⁵ The Tennessee Supreme Court, operating without legislative guidance or an agreement signed by the parties, crafted and applied a balancing test that considered Constitutional rights traditionally recognized in other areas of reproductive law, as well as “the significance of [the parties’] interests, and the relative burdens that will be imposed by differing resolutions.”²⁶

The Tennessee Court identified the specific individual freedom as an issue of procreative autonomy.²⁷ According to the court, this right to procreational autonomy is composed of two rights: the positive right to procreate and the negative right to avoid procreation, each equal in their significance.²⁸ The Tennessee Court reached this conclusion by reviewing reproductive privacy cases such as *Skinner v. Oklahoma*, which established the affirmative right to procreate as a fundamental civil right.²⁹ *Eisenstadt v. Baird* clarified procreational autonomy as “the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into

²³ *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

²⁴ *Ibid.*, 592.

²⁵ *Ibid.*, 590.

²⁶ *Ibid.*, 603.

²⁷ *Ibid.*, 600-601.

²⁸ *Davis v. Davis*, 601.

²⁹ *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

matters so fundamentally affecting a person as the decision whether to bear or beget a child.”³⁰

The Tennessee court also briefly examined the state interest in “potential life” that can justify certain intrusions into this procreational right, but concluded that such an interest is not significant enough in cases of embryo disposition.³¹

In its analysis, the court explored the potential consequences of both donation and destruction for each party. Junior testified that he suffered as a child of divorced parents, seeing his mother only monthly and his father only a few times before he died.³² Due to his difficult childhood, Junior was “vehemently opposed to fathering a child that would not live with both parents.”³³ He was largely concerned not only with the psychological effects he would face knowing that he was a genetic parent to a child he might never meet, but also the potential that the child would be left in a single-parent household if the recipient couple divorced.³⁴

Mary Sue, on the other hand, claimed that destruction of the embryos would leave her with the “burden of knowing that the lengthy IVF procedures she underwent were futile,” and those embryos she helped to create would never develop into children.³⁵ The court, recognizing that this burden was not insignificant, nevertheless translated these potential burdens into the conclusion that Mary Sue’s right to “procreate” through donation was not substantial enough to overcome Junior’s desire to avoid becoming a genetic parent. There was no clear test applied to determine which right of procreational autonomy should prevail; the court simply engaged in a subjective balancing test based on these potential effects on the parties. The court further

³⁰ Davis v. Davis, 600, quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (emphasis in original).

³¹ Ibid., 602-03.

³² Ibid., 603-04.

³³ Ibid., 604.

³⁴ Ibid.

³⁵ Ibid.

emphasized, “Donation, if a child came of it, would rob him twice – his procreational autonomy would be defeated and his relationship with his offspring would be prohibited.”³⁶

Although not part of the final holding, the court suggests that Mary Sue may have had a greater interest if she was asking to implant the embryos either in herself or a surrogate, giving her custody of any resulting children.³⁷ If this were the case, the court would have taken into account several factors, including whether she would have a reasonable opportunity to undergo IVF again and whether she would consider adoption as an alternative to genetic parenthood.³⁸

The court concluded by articulating a three-part test to be used as a judicial guide for determining how to resolve disputes over embryos.³⁹ First, the preferences of the progenitors should control the disposition. However, if they cannot agree, courts should then look to any prior agreement signed by both parties that governs the disposition of frozen embryos in divorce. If no such contract exists, the court should weigh the interests of either party in using or not using the embryos in question. In this balancing test, the party wishing to avoid procreation should prevail on the assumption that the other party can demonstrate that he or she does not have a reasonable possibility of achieving parenthood by any other means, because the court seems to hold that the psychological burden of having genetic children is greater than the inability of the other party to procreate with the embryos at issue. Only then may a court consider allowing use of the embryos over the objection of the party who wants to avoid procreation.

Courts in other states have relied on the *Davis* approach when the contracts signed by the parties before IVF either did not apply to disposition upon divorce, or were declared void as

³⁶ *Davis v. Davis*, 604.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

being against public policy by the jurisdiction. In Massachusetts, the court in *A.Z. v. B.Z.* found that the agreement signed by husband and wife, directing that the embryos should be returned to the wife “should [they] become separated,” did not apply.⁴⁰ The court disregarded the contract for several reasons. First, the court found that the contract was not supposed to be binding on the parties in case of a disagreement between them, but instead existed to define the donors’ “relationship as a unit to the clinic.”⁴¹ Second, the contract did not contain a duration provision, and the court held that there was no evidence to suggest that they intended the contract to apply four years later after the circumstances of their marital relationship had changed.⁴² The contract also did not define what the parties meant by “become separated;” because separation and divorce are legally distinct, the court found that an agreement relating to separation could not be binding in divorce.⁴³ Also, because the form was legally insufficient to be considered a separation agreement, it could not be binding on the parties in a divorce.⁴⁴ Finally, the court found a problem with the fact that the husband and wife signed the original consent form together, but the husband signed each subsequent consent form for each IVF treatment separately, while it was still blank.⁴⁵ The wife later filled in the provisions giving her custody of the embryos upon separation, which mirrored the language of the original consent form to which they agreed.⁴⁶ The court held that because the husband signed a blank consent form, even though he knew what provisions would later be written, the agreement did not represent his true intent and therefore was not binding.⁴⁷ In the divorce proceeding, the wife asked that the embryos be

⁴⁰ *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1054, 1057 (Mass. 2000).

⁴¹ *Ibid.*, 1056.

⁴² *Ibid.*, 1056-57.

⁴³ *Ibid.*, 1057.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

given to her for implantation, but the husband petitioned the court to block implantation because he did not want to be a genetic parent.⁴⁸ The court held in favor of the husband based on his right to avoid procreation, stating the court “would not enforce an agreement that would compel one donor to become a parent against his or her will.”⁴⁹

The Supreme Court of New Jersey considered the husband’s ability to procreate without the frozen embryos in *J.B. v. M.B.*, concluding that the wife’s right to avoid procreation, coupled with the husband’s potential for procreation by other means, meant that the embryos would not be given to the husband for implantation in a surrogate.⁵⁰ However, the court applied this analysis without considering the husband’s ethical opposition to destruction of the embryos and his wish that the embryos be donated to allow them the opportunity to develop.⁵¹ Instead of engaging in an analysis that took into account his religious beliefs that an embryo should not be destroyed, the court simplified the dispute to consideration of only the two rights of procreative autonomy: the right to procreate and the right to avoid procreation. There was no discussion of the husband’s moral position as it related to the disposition of the embryos, but as an afterthought, and a possible concession to his religious beliefs, the court held that, if the husband was willing to pay the fees, the embryos could remain cryopreserved indefinitely with the wife’s permission.⁵²

Although the Constitutional rights approach takes more factors into consideration than the contract approach, discussed below, it ultimately ends with a decision in favor of the party asserting the right to avoid procreation. Without more, this approach is no longer an analysis, but the beginning of a bright-line test automatically ruling in favor of the party who refuses to

⁴⁸ Ibid., 1053.

⁴⁹ Ibid., 1057.

⁵⁰ *J.B. v. M.B.* 783 A.2d 707 (N.J. 2001).

⁵¹ Ibid.

⁵² Ibid., 720.

allow the embryo to be implanted. This kind of approach does not attempt to place the decision in the hands of the progenitors, nor does it recognize the gravity of the outcome for the parties involved. Instead, it gives one party the power to decide: the party who wants the embryo to be destroyed or remain frozen. If the two rights of procreational autonomy are the benchmark for this decision, no religious belief or psychological circumstances could affect the conclusion. Although this approach looks at two of the fundamental rights of the parties involved, it does not consider enough of them to make an adequate decision.

2. Contract Approach

Other states recognize and enforce pre-IVF agreements signed by the parties that dictate the disposition of frozen embryos in the event of divorce in an attempt to enforce the original intention of the parties, effectively taking the dispute out of the hands of the court, except as a mechanism for interpreting the contract. In *Kass v. Kass*, the couple had agreed prior to the IVF process that if they were unable to agree on the disposition of their embryos, then the embryos should be donated for research.⁵³ At the time of their divorce settlement, the wife asked to implant the embryos, “claiming this is her only chance for genetic motherhood,” while the husband objected to the wife’s request and sought to enforce the default provision in the contract that specified donation for research.⁵⁴ The Court of Appeals of New York upheld the agreement, and, reviewing the contract in its entirety, ordered the embryos to be donated for research.⁵⁵

A Texas Court of Appeals also upheld such a contract in *Roman v. Roman*, holding that such agreements are valid and enforceable if they manifest “a voluntary unchanged mutual

⁵³ *Kass v. Kass*, 696 N.E.2d 174, 176-77 (N.Y. 1998).

⁵⁴ *Ibid.*, 175-76.

⁵⁵ *Ibid.*, 182.

intention of the parties regarding disposition of the embryos upon divorce.”⁵⁶ The contract at issue provided that, in the event of divorce, the couple wished to discard any frozen embryos that remained.⁵⁷ In court, the wife argued that her understanding of the agreement at the time it was made was that only after the couple attempted to implant some of the embryos would this provision allow the embryos to be discarded.⁵⁸ She believed that, since they had not used any of the embryos and therefore she did not have the chance to become pregnant, the provision requiring destruction of the embryos should not be enforced.⁵⁹ However, the court looked only to the agreement, and ruled that there was a meeting of the minds between the couple at the time the contract was signed, and neither party had expressly revoked his or her consent to any provision prior to this litigation.⁶⁰ Therefore, the provision was enforceable and the embryos were discarded.⁶¹

Some courts have enforced provisions of the contract that determine the disposition of the embryos on a technicality to avoid an in-depth discussion of the merits of this kind of conflict.⁶² The Supreme Court of Washington did just this in *Litowitz v. Litowitz*, where the contract signed by both parties requested that, if one of four contingent events occurred, their embryos would be thawed and not allowed to develop.⁶³ Although divorce was not specified in the agreement, one of the contingent events listed was cryopreservation for five years without a request for an

⁵⁶ Roman v. Roman, 193 S.W.3d 40, 50 (Tex. App. 2006).

⁵⁷ Ibid., 42.

⁵⁸ Ibid., 53.

⁵⁹ Ibid., 53.

⁶⁰ Roman v. Roman, 54-55.

⁶¹ Ibid., 55.

⁶² See Judith Daar, “Litowitz v. Litowitz: Feuding Over Frozen Embryos and Forecasting the Future of Reproductive Medicine,” in *Health Law & Bioethics*, eds. Sandra Johnson et. al. (New York: Aspen Publishers), 97-119.

⁶³ Litowitz v. Litowitz, 48 P.3d 261, 263-64 (Wash. 2002).

extension by the parties.⁶⁴ The agreement also provided that, if they were not able to agree on the proper disposition, they should petition the court to decide for them.⁶⁵ After surveying other states' decisions regarding the disposition of embryos upon divorce, including the consideration of various interests of the parties, the court held that more than five years had passed since the initial cryopreservation of the embryos, and if the embryos have not already been destroyed, they should be thawed according to the original agreement signed by the parties.⁶⁶ The decision did not address the petitions of either party, and the court did not engage in a discussion evaluating the parties' interests in the embryos; in fact, according to the lower court opinion, neither David nor Becky Litowitz wanted their embryos to be destroyed.⁶⁷ Although David did not want to be a parent, and therefore asked that the embryos be donated to a couple in another state, Becky hoped to implant the embryos in a surrogate so that she could raise the resulting child as her own.⁶⁸ David ultimately was satisfied with the result, because he avoided the possibility of parenthood, but this case raises the question of whether contracts requiring destruction of embryos should be enforced when neither party wants that result.⁶⁹

Contract law provides disputes over custody of embryos with a standard analysis, attempting to ensure consistency in adjudication, but it fails to anticipate and correct several problems that may arise. For example, as in Litowitz, a couple who initially signed a contract agreeing to destroy their embryos if they decided to divorce would be held to that contract even if neither party wanted the embryos to be destroyed at the time of divorce. As long as the two could not agree on who should take the embryos, the court, under the contract approach, would

⁶⁴ Ibid.

⁶⁵ Ibid. at 268.

⁶⁶ Ibid. at 265-70.

⁶⁷ Litowitz v. Litowitz, 10 P.3d 1086, 1088 (Wash. App. 2000).

⁶⁸ Ibid.

⁶⁹ Daar, 108.

enforce the provision requiring destruction. This result is even more absurd if both of the parties had become morally opposed to the destruction of their embryos since signing the original contract. The contract approach leaves little room for judicial consideration of these changed circumstances.

3. Contemporaneous Mutual Consent Approach

One of the more interesting examples of the judicial resolution of embryo disposition is *In re Marriage of Witten*, a 2003 Iowa case involving a contract that required the written consent of both parties to take any action with the embryos, but did not address the possibility of divorce.⁷⁰ In its analysis of both the contract model and what it called the contemporaneous mutual consent model, the court identified what it determined was a valuable principle underlying both approaches: the couple that created the embryos should be the ones who decide their fate.⁷¹ However, the court, wanting to respect the freedom to contract in reproductive arrangements, nevertheless identified the post-agreement dispute as a fundamental problem in the contract model. The intimacy and importance of such a decision requires more than a look back to the pre-IVF agreement in those situations in which the husband and wife no longer agree about what should happen to their embryos. The court therefore determined that pre-IVF agreements are valid and enforceable, but subject to either party changing his or her mind.⁷² If the parties cannot agree at the time of litigation, the court held that those embryos should remain frozen to preserve the status quo, and therefore not prejudice either party until an agreement can be reached.⁷³

⁷⁰ *In re Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003).

⁷¹ *Ibid.*, 777.

⁷² *Ibid.*, 782.

⁷³ *Ibid.*, 783.

This approach offers protection for parties with a strong psychological or moral aversion to a particular outcome while respecting, in theory, a couple's right to contract at the start of the process. In practice, contracts in this and other similar jurisdictions have no legal effect; instead, the outcome is based on the agreement or non-agreement of the parties at the time of litigation. It also raises a question about the potential outcome: what happens when the parties not only cannot agree, but also do not wish to continue to pay for storage? If the court orders the continued cryopreservation of the embryos while both parties want them implanted, how can the continued payment for that freezing be ordered indefinitely?

This approach also seems to strip the original agreement of any binding effect, stating that, although the agreement is valid, it is not enforceable if one of the parties has changed his or her mind at the time of the dispute. In standard contract law, this would be considered a breach of contract, and the other party could sue for damages or specific performance. It is likely, however, that if the parties agreed on disposition during their divorce, deciding what to do with their embryos would not become an issue for the court in the settlement agreement. Adopting this approach therefore does not achieve the state goals of encouraging pre-IVF contracts and creating a valid test to settle disagreements, but rather places a judicial stamp of approval on the ability of couples to agree on how best to allocate their embryos.

D. EMBRYO DONATION IN THE LAW

Although courts have not yet had the occasion to decide disputes of parentage in embryo donation, as the practice expands and becomes more popular, legal challenges are likely to arise. Currently, few states have directly addressed the practice of embryo donation, and those that

have give effect to agreements between parties and often declare the birth mother to be the legal parent. Still, there is no uniformity among states or in any uniform laws governing the practice, which leaves open the possibility of legal challenges to the custody of children born of embryo donation.

1. Current Legislative Approaches

Without clear legislative guidance, courts may be forced to examine the issues by analogy to similar situations to determine the legal rights and duties associated with embryo donation. For example, the Uniform Parentage Act contains provisions addressing the donation of gametes, which may be seen as governing embryo donation, but these statutes do not provide clear legislative guidance on the issue. Another approach is to provide legislative recognition of contracts for embryo donation while anticipating confirmation of that transaction through adoption procedures after birth. The Georgia code, for example, provides that “the contract may include a written waiver by the legal embryo custodian of notice and service in any legal adoption or other parentage proceeding which may follow,” indicating that although adoption does not occur before birth, the state will recognize such contracts.⁷⁴ This arrangement, however, relies on the cooperation of the parties in following through with the waiver of rights, which is often the source of litigation when reproductive technologies have been employed.

Still another approach is the most clear: to recognize explicitly the legality of embryo adoption. To date, the only state to take this approach is Louisiana, which confers on the embryo the status of “juridical person” from the time of fertilization until implantation in the uterus.⁷⁵ A juridical person may sue or be sued, and this concept is often the principle that allows

⁷⁴ *Georgia Code Annotated*, sec. 19-8-41 (2010).

⁷⁵ *Louisiana Revised Statutes*, sec. 9:123 (2011).

corporations to exercise these same rights to sue and be sued.⁷⁶ According to Louisiana law, parties who wish to donate an embryo must renounce their parental rights by notarial act, and the recipient parents must “[execute] a notarial act of adoption of the in vitro fertilized ovum.”⁷⁷

Other states recognize the legal parentage of the recipients based on the embryo donation contract, but subject to certain limitations. In Oklahoma, the written consent of the parties on both sides of the transaction must be obtained, and the embryo must be the product of the donors’ gametes.⁷⁸ If these requirements are met, the receiving parties are considered to be the natural parents of the resulting child, and the donors have no rights.⁷⁹ In Ohio, the party or parties who received the donated embryo are considered to be the natural parents of the child born of the recipient; if a woman is single, she is considered to be the natural mother, and if she is married, both she and her husband are treated as the natural parents.⁸⁰ This presumption of parenthood is rebuttable only if the husband did not give consent to the donation.⁸¹

Although these scattered statutes give effect to many embryo donation contracts, they are inconsistent across state lines and they affirm legal parenthood only in hindsight. If a dispute arises between the donor and recipient families over custody of the resulting child, these laws require courts to look back at the intent of the original contract and determine custody based on the intent of the parties instead of effecting the permanent legal change in “parental” status when the original transfer occurs. Although this “look back” is the natural consequence of the nature

⁷⁶ “An entity...created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being; An entity is a person for purposes of the Due Process and Equal Protection Clauses but is not a citizen for purposes of the Privileges and Immunities Clauses in Article IV § 2 and in the Fourteenth Amendment.” *Black’s Law Dictionary* 9th ed.

⁷⁷ *Louisiana Revised Statutes*, sec. 9:130 (2011).

⁷⁸ *Oklahoma Statutes*, ch. 10, sec. 566 (2010).

⁷⁹ *Ibid.*

⁸⁰ *Ohio Revised Code Annotated*, sec. 3111.97 (2011).

⁸¹ *Ibid.*

of the American judicial process, establishing a more concrete and permanent mechanism of the transfer of custody of the embryo at the time of donation will minimize the need for courts to interfere with recognized legal parenthood. The lack of such a mechanism can lead to increased litigation and uncertainty in such an intimate area, where couples should know at the time of transfer, not at birth, whether they are the legal parents.

2. The Legal Insufficiency of Contract Law

Some of the laws regarding embryo donation terminate the rights of the donor couple and establish the parentage of the couple receiving the embryo by assuming the child is the natural child of the gestational mother and her husband. Although this seems like a definitive solution to the potential problem of determining parentage, the process of upholding this legislative declaration is based on the enforcement of the embryo donation contract. At the outset, couples willing to participate in embryo donation indicate their intentions through simple written consent, authorizing a transfer of one or more embryos. Under the laws of the states currently regulating embryo donation, the presumption of parentage attempts to block challenges to this transaction based on the idea that the intention of the parties who signed the agreement should be respected and enforced. However, the use of contract law, despite this statutory support, opens the door to legal challenges based on claims of fraud or lack of capacity, which should not necessarily be precluded because of the presumption of parentage.

While it is important in areas of reproductive technologies to uphold the intentions of the parties most intimately involved, the process of embryo donation is too complex to be governed by simple contract law. A contract approach can work with respect to business transactions with the fertility clinic, such as storage or transfer to another facility, because the subject of the

contract is not a person, but the services offered to achieve birth. Although the contract between the parties and the IVF clinic is entered into with the intention of having a child as a result, the contract with the clinic governs the fertilization of the ovum, storage, and embryo transfer; once these procedures are completed, and before a child can be born, the contract no longer has effect. It can also be useful for determining who should get frozen embryos upon divorce or disagreement, because the subject of the contract will not develop into a person during the performance of that contract. However, contract law is not suitable to govern a situation in which the subject of the contract is a person. Although the embryo is not itself legally a person, the agreement between the donors and the recipients not only has as its goal the birth of a person from that embryo, but also is in effect until parental rights can be transferred at birth. If birth were not the ultimate goal, the donor couple would not choose to donate their embryo to another couple, and the donee couple likewise would not participate in the program. It is because this agreement necessarily contemplates the creation of a born child, and subsequently governs the custody of that child, that contract law is insufficient to regulate the practice.

3. The Subject of Contracts

“A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”⁸² It is a legal vehicle that creates an obligation that extends until the promises on either side are fulfilled. In embryo donation, the donor couple promises to transfer their interest in the embryo to the donee couple, giving up any and all parental rights (including the right to sue for custody), and the donee couple promises to accept the embryo for purposes of implantation and gestation, with the

⁸² 1 Samuel Williston, *Contracts*, sec. 1.1, 4th ed. 1990.

intention of raising the resulting child. Because the embryo is not a person, the donor couple does not have traditional parental rights.⁸³ Although individuals may generally waive their right to future property they may possess, courts do not give effect to contracts that waive future parental rights, because the court will always look to the best interests of the child at the time of the proceeding.⁸⁴ For example, in the Georgia case *Stanton v. Stanton*, the court held that a prenuptial agreement signed by the husband and wife requiring their children to be raised in a particular faith would not bind the court to grant custody to the husband upon divorce, because the court looked to the child's best interest at the time of divorce, not the agreement of the parties before marriage.⁸⁵ As the court articulated, "Parents cannot by contract control the discretion and duty of the court in determining the question of custody, and the court may disregard the contract and award the children to either parent or to a third party if the best interest of the children requires it."⁸⁶

Contracts between parents or those who may become parents are generally unenforceable because they take away from the court the right to determine custody based on the best interests of the child. The courts are so concerned with the welfare of the child that they always look at his or her best interests, regardless of the agreements anyone, including the parents, have entered into. While courts may consider the contract, such agreements are not legally enforceable when they predetermine custody of a child. Courts are also hesitant to uphold contracts that determine in advance the parental status of one or both parents, which is not only seen in prenuptial agreements, but in embryo disposition cases as well. Although some jurisdictions uphold the

⁸³ Parental rights are "A parent's rights to make all decisions concerning his or her child, including the right to determine the child's care and custody, the right to educate and discipline the child, and the right to control the child's earnings and property." *Black's Law Dictionary*, 9th ed.

⁸⁴ *Stanton v. Stanton*, 100 S.E.2d 289, 293 (Ga. 1957).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

contract approach to allocation of embryos upon divorce, many others consider the parties' constitutional rights and other interests in determining who should have "custody" of the embryos, and whether those embryos should be allowed to develop into a born child.

For example, the husband and wife in *A.Z. v. B.Z.* signed a contract providing that, in the event of the couple's separation, the right to custody of the embryos be given to the wife for implantation if she still wished to gestate them.⁸⁷ Although the court ultimately determined that the agreement did not contemplate divorce and therefore did not apply, it explained in dicta that if the contract did apply, the wife still would not have received the embryos and the same result would have been reached.⁸⁸ According to the court, it "would not enforce an agreement that would compel one donor to become a parent against his or her will," even if there were a contract in place in advance where that donor relinquished his or her claim to the embryo.⁸⁹ In these cases, as explained earlier, the constitutional right of a progenitor of an embryo to avoid procreation is often the reason courts block implantation, even if that party had originally signed an agreement allowing for implantation. Courts wish to respect the right of parties to change their minds about procreation using their frozen embryos, because this kind of transaction is more fundamental and intimate than property transfers. If this kind of contract, which provides for the relinquishment of future parental rights and subsequent implantation in another woman upon divorce, is not enforceable in many jurisdictions in cases of embryo disposition, how could similar contracts be enforced in embryo donation? Although it may be difficult, if not impossible, to block the "forced procreation" of the objecting donor in embryo donation if the embryo has already been implanted, it is conceivable that one or both parties to the embryo donation contract could change his or her mind after the contract became effective but before it

⁸⁷ *A.Z. v. B.Z.*, 1054.

⁸⁸ *Ibid.*, 1057-58.

⁸⁹ *Ibid.*, 1057.

was implanted. If simple contract law were applied to this situation, as in prenuptial agreements containing custody provisions and contracts about disposition of embryos, the contract would likely be considered unenforceable.

Insufficiency of contract law is evident in other areas of reproductive technologies such as gestational surrogacy arrangements. In such situations, couples often contract with a woman who agrees to implant and gestate the embryo, and return the child to the intended parents after birth. She also agrees as part of the arrangement to relinquish parental rights when they arise at birth to allow the intended parents to have full custody of the child. However, several courts have been faced with legal challenges to these contracts brought by the surrogate mother who refuses to give up the child and instead asserts her own parental rights. In *Johnson v. Calvert*, the intended parents brought an action to challenging the surrogate mother's declaration that she is the "natural mother" of the child she gestated for Mark and Crispina Calvert.⁹⁰ Although the court recognized both as "natural mothers" under the Uniform Parentage Act, which provided that both genetic link and giving birth are evidence of parentage, the laws of California prohibited more than one woman being named the mother of a child.⁹¹ The court thus turned to the test of intent, and determined that the Calverts, who entered into this agreement with the intent of parenting the resulting child, were the legal parents.⁹²

The Uniform Parentage Act, amended in 2000, clarified the legal status of the gestational mother for those states that have adopted it, but jurisdictions without the UPA and cases involving more complex reproductive arrangements have led to a continuous stream of litigation

⁹⁰ *Johnson v. Calvert*, 851 P.2d 776 (Ca. 1993).

⁹¹ *Ibid.*, 781-82.

⁹² *Ibid.*, 782.

about parental status.⁹³ Furthermore, although the courts often look back to the gestational surrogacy contract and recognize the intent to parent as the deciding factor in these cases, the UPA's prescribed procedure for such arrangements requires the intended parents to "file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction," and the court will confirm the intended parents' legal parenthood.⁹⁴ Despite the original arrangement that specifies the parties who assume parental rights over the resulting child, the courts do not recognize legal parenthood (and the intended parents cannot file) until after the birth of the child.⁹⁵ This is an indication that, although the contract may ultimately be enforced, the judicial system does not recognize parental rights or their transfer until after birth. If this recognition does not occur until after birth, it leaves open the possibility of the donor couple refusing to follow through with the adoption paperwork and challenging the donee couple for parental rights before the formal adoption is completed.

While contract law may be sufficient in most situations to govern the transfer and gestation of an embryo between consenting parties, it does not provide the finality and assurance that agreements involving embryos and children need. In embryo donation, the purpose of the practice is to give individuals the opportunity to become parents with the embryos another couple has already created, not merely to transfer ownership of a frozen embryo that will remain frozen. The result of this arrangement, if biology permits, is a child, and couples who "contract" for that child deserve the reassurance that their agreement is permanent, immune from legal challenges and immediately recognizable under the law, which are protections that contract law is unable to provide.

⁹³ Uniform Parentage Act, sec. 807 (2002); *see In re C.K.G., C.A.G., & C.L.G.*, 173 S.W.3d 714 (Tn. 2005).

⁹⁴ Uniform Parentage Act, sec. 807.

⁹⁵ *Ibid.*

III. CATHOLIC PERSPECTIVES ON EMBRYO DONATION

The Catholic Church has historically taken a strong interest in bioethical issues as evidenced by the bioethical nature of many encyclicals in the last century.⁹⁶ In particular, the Church has focused much of its attention on reproductive ethics, articulating clear teaching on several topics including contraception, abortion, and many reproductive technologies. However, the Church, like the law, has yet to formulate a definitive stance on the practice of embryo donation or adoption. While some theologians, such as Christopher Tollefsen,⁹⁷ argue that this technology will provide a solution to what the Church views as the dilemma of cryopreserved embryos, others, including Mary Geach⁹⁸ and Monsignor William Smith,⁹⁹ insist such technology violates long-held Catholic moral principles of procreation.

⁹⁶ See, e.g., Paul VI, *Humanae Vitae*, Of Human Life, July 25, 1968, Vatican Website, http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html; Congregation for the Doctrine of Faith, *Donum Vitae*, On Respect for Human Life in its Origin and on the Dignity of Procreation, February 22, 1987, Vatican Website, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

⁹⁷ Christopher O. Tollefsen, “Could Human Embryo Transfer Be Intrinsically Immoral?” in *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, eds. Sarah-Vaughan Brakman and Darlene Fozard Weaver (Springer Science + Business Media B.V., 2007), 85.

⁹⁸ William E. May, *Catholic Bioethics and the Gift of Human Life* (Huntington, IN: Our Sunday Visitor, Inc., 2000), 96.

⁹⁹ Reverend William E. Stempsey, “Heterologous Embryo Transfer: Metaphor and Morality,” in *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, eds. Sarah-Vaughan Brakman and Darlene Fozard Weaver (Springer Science + Business Media B.V., 2007), 31.

The Congregation for the Doctrine of the Faith (CDF), which is charged with the duty “to promote and safeguard the doctrine on the faith and morals throughout the Catholic world,”¹⁰⁰

formulated a general instruction on licit treatments for infertility in its document *Dignitas*

Personae:

“With regard to the *treatment of infertility*, new medical techniques must respect three fundamental goods: a) the right to life and to physical integrity of every human being from conception to natural death; b) the unity of marriage, which means reciprocal respect for the right within marriage to become a father or mother only together with the other spouse; c) the specifically human values of sexuality which require ‘that the procreation of a human person brought about as the fruit of the conjugal act specific to the love between spouses’.”¹⁰¹

Many of the Church’s teachings on sexual and reproductive ethics are based on the principle of the indissolubility of marriage¹⁰², and the principle that all sexual acts must be unitive and procreative, which both affirm the couple’s marital union, their openness to children, and the inseparability of the two.¹⁰³ In 1968, Pope Paul VI authored the encyclical *Humanae Vitae*, which clearly articulated this long-standing teaching on marriage and procreation.¹⁰⁴ The doctrine states that the nature of the marital union is to “[unite] husband and wife in the closest

¹⁰⁰ Vatican, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_pro_14071997_en.html (accessed March 16, 2011).

¹⁰¹ Congregation for the Doctrine of Faith, *Dignitas Personae*, Instruction Dignitas Personae on Certain Bioethical Questions, February 22, 1987, Vatican Website, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html, sec. 12.

¹⁰² For purposes of clarity, the indissolubility of marriage is explained in the Catechism of the Catholic Church: “The covenant between the spouses is integrated into God’s covenant with man... Thus *the marriage bond* has been established by God himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved. This bond, which results from the free human act of the spouses and their consummation of the marriage, is a reality, henceforth irrevocable...” Catechism of the Catholic Church, sec. 1639-40.

¹⁰³ *Humanae Vitae*.

¹⁰⁴ See Pius XI, *Casti Connubii*, On Christian Marriage, December 31, 1930, Vatican Website, http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

intimacy [and render] them capable of generating new life.”¹⁰⁵ The Catechism of the Catholic Church further explains this concept in section 2363: “The spouses’ union¹⁰⁶ achieves the twofold end of marriage: the good of the spouses themselves and the transmission of life. These two meanings or values of marriage cannot be separated without altering the couple’s spiritual life and compromising the goods of marriage and the future of the family.”¹⁰⁷

The Church claims that union and procreation are so fundamental to the nature of marriage that any act or technology that separates the two purposes of the marital act is deemed illicit.¹⁰⁸ The use of chemical, barrier, or sterilizing methods of contraception is therefore ethically impermissible because their intended purpose is to close the sex act to the possibility of procreation.¹⁰⁹ Similarly, IVF separates the unitive and procreative aspects of the marital act because it causes conception to occur outside of that act, and is therefore also not permissible according to Church teaching. The CDF stated in its publication *Donum Vitae*, “[A] child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage.”¹¹⁰ Furthermore, the Church teaches that reproduction that separates these two purposes changes the nature of the act from procreation to production, “treating the child as if he or she were a product.”¹¹¹ It is from this principle of inseparability that the Church reaches its conclusions that certain reproductive technologies are illicit.

¹⁰⁵ *Humanae Vitae*, sec. 12.

¹⁰⁶ Spousal union refers to the sexual union of husband and wife.

¹⁰⁷ *Catechism of the Catholic Church*, 2d ed. (Washington: United States Catholic Conference, 1997), 2363.

¹⁰⁸ *Donum Vitae*.

¹⁰⁹ There are limited circumstances in which contraception can licitly be used as emergency contraception after rape, if tests indicate the woman has not conceived or ovulated. Ethical and Religious Directive 36.

¹¹⁰ *Donum Vitae*, II-A-1.

¹¹¹ May, 79.

A. IN VITRO FERTILIZATION

The Church claims that the process of *in vitro fertilization* and embryo transfer (IVF-ET) is always illicit because it separates the two purposes of the marital act and makes the child a product of technology instead of the result of a procreative act. According to William May, “When new human life comes to be as a result of...homologous IVF-ET, it comes to be as the end product of a series of actions, transitive in nature, undertaken by different persons in order to make a particular product, a human baby.”¹¹²

The Church distinguishes between heterologous and homologous IVF, but both are still deemed illicit.¹¹³ In heterologous IVF, one or both gametes used in creating the embryo are from a donor instead of the intended mother or father, and the resulting embryo is implanted into the gestational mother, who may or may not be the intended mother.¹¹⁴ It is condemned as illicit by the Church in part because it allows a woman to conceive a child and become pregnant by the sperm of a man who is not her husband, which violates what Catholic doctrine asserts is an inviolable marital covenant where the union and procreation should occur through the spouses alone.¹¹⁵ Homologous IVF uses the gametes of both of the intended parents to create the embryo to be implanted.¹¹⁶ This kind of IVF is most useful for couples who have viable gametes and wish to have genetically-related offspring. Although the woman does become pregnant through use of her husband’s sperm, unlike heterologous IVF, procreation still occurs outside of the womb and outside of the sexual act, and is therefore illicit.¹¹⁷

¹¹² May, 81.

¹¹³ Ibid., 80.

¹¹⁴ *Donum Vitae*, II

¹¹⁵ May, 80.

¹¹⁶ *Donum Vitae*, II

¹¹⁷ May, 80-81.

B. GESTATIONAL SURROGACY

Gestational surrogacy uses the same technology as IVF to fertilize an egg and implant an embryo; therefore, this practice also violates the principle of inseparability of union and procreation and has similarly been deemed impermissible by the Church.¹¹⁸ However, the added practice of implanting the embryo into a woman who intends to gestate the embryo for the sole purpose of returning the born child to the intended parents provides an additional ethical problem in Catholic teaching. It divides the “physical, psychological and moral elements which constitute...families,” because the Church teaches a child should be conceived, carried, born to and brought up by its own parents whenever possible.¹¹⁹ In gestational surrogacy, not only has the embryo been deprived of the right to be conceived in its mother’s womb, but also the right to be carried by and born of its mother. Instead, the genetic or intended mother has given the embryo to another woman to nurture and gestate the embryo, which will then be returned to the intended mother. The Church teaches that such gestational surrogacy arrangements violate marital chastity by separating the unitive and procreative aspects of the marital act, and cause a “division between the physical, psychological and moral elements which constitute...families.”¹²⁰

C. THE EMBRYO DONATION DEBATE

Although the Catholic Church has articulated many teachings on the ethics of reproductive technologies, it has not officially addressed the practice of embryo donation in any meaningful

¹¹⁸ *Donum Vitae*, II-A-3.

¹¹⁹ *Donum Vitae*, II-A-3.

¹²⁰ *Ibid.*

way. Those who argue against it identify its similarities to, and potential complicity in, other reproductive technologies that have been determined to be illicit, such as surrogacy and IVF, and believe embryo donation is similarly contrary to current Catholic social teaching on procreation and marital chastity.¹²¹ However, this novel issue of frozen embryos has created a situation that requires more than an assumption that embryo donation is merely another illicit reproductive technology, because current Catholic social teaching doesn't address and would be inappropriately applied to the exploration of potential ethically permissible options for the disposition of frozen embryos. This ethical permissibility relies on a deeper understanding of the contexts in which embryo donation should be allowed, recognizing the moral neutrality of the act of embryo transfer and applying the Church's understanding about life. The next three sections raise three objections to the moral permissibility of embryo donation in the Catholic tradition, and discuss the reasons why these objections do not provide an adequate basis for the argument that embryo donation is impermissible.

1. It is Like IVF

The CDF, in *Dignitas Personae*, briefly mentioned embryo donation or “prenatal adoption,” but dismissed it as illicit in the same way as other reproductive technologies without much discussion.¹²² The Church has rejected IVF and other reproductive technologies because they replace the sexual act as the “cause” of human conception. When fertilization occurs in a laboratory, the procreative and unitive goods of marriage are separated; the procreation occurs without the corresponding union of spouses. After that fertilization, in IVF without a surrogate,

¹²¹ See Catherine Althaus, “Human Embryo Transfer and the Theology of the Body,” in *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, eds. Sarah-Vaughan Brakman and Darlene Fozard Weaver (Springer Science + Business Media B.V., 2007).

¹²² *Dignitas Personae*, sec. 19.

the resulting embryo is implanted into the mother to be gestated and born, and subsequently raised by that mother.

IVF necessarily involves both *in vitro* fertilization and implantation, but the Church in its historical evaluation of the practice has never considered these actions separately. In the context of embryo donation, although conception occurs outside of the marital act, the entire IVF process is stopped and implantation does not occur in conjunction with the original IVF. The couple that intends to gestate the embryo does not attempt to conceive outside of the marital act, but to intervene in the illicit IVF process begun by another and nurture what the Church considers the “life” of the already-existing embryo.

Once fertilization has occurred, the Church teaches that the embryo is a separately existing full human person, entitled to “the inviolable right of every innocent being to life.”¹²³ Building upon this belief, one can reconceptualize the transfer and subsequent implantation of the embryo; although *in vitro* fertilization and implantation are both components of illicit reproductive technologies, once the embryo is formed and subsequently abandoned, implantation is no longer part of the IVF process but a separate and distinct medical procedure intended to provide shelter and nutrition to what the Church calls a human person. Therefore, although the Church calls procreation outside of the marital act illicit, embryo donation is not itself procreation, because procreation has already occurred. This distinction is necessary to establish the permissibility of embryo donation, because while IVF violates Catholic principles of sexuality and deprives the embryo of the right to be conceived in the womb, embryo donation respects the dignity of early human life (as defined by the Church) by providing the embryo with the opportunity to be gestated, born, and parented by its adoptive parents. Because this

¹²³ *Catechism of the Catholic Church*, sec. 2270.

procedure is not procreation, although it shares characteristics of illicit reproductive technologies, it is not analogous to IVF in a moral evaluation and therefore should not be condemned on that basis.

2. The Church has Already Condemned The Practice

Monsignor William Smith presents his argument against embryo donation by relying on the language of *Donum Vitae* as evidence of the Church's already-existing condemnation of the procedure. Under the document's discussion of the use of embryos obtained by IVF for research purposes, the CDF asserts that no acts can be performed that lead to the destruction of the embryo because the Church "forbids acts against the life of these human beings."¹²⁴ This section ends with the passage on which Smith relies to justify a condemnation of embryo donation: "In consequence of the fact that they have been produced *in vitro*, those embryos which are not transferred into the body of the mother and are called 'spare' are exposed to an absurd fate, with no possibility of their being offered safe means of survival which can be licitly pursued."¹²⁵ Smith argues that this excerpt should be read at face value, explicitly stating that no option for these frozen embryos, including embryo donation, could be licit.¹²⁶

This passage, written in 1987, was written as a response to the suggestion that spare embryos could be used for research, which is clearly against Catholic Church teaching because it leads to the intentional destruction of the embryo. *Donum Vitae* does not address the option of embryo donation, which could prevent the destruction or deterioration of frozen embryos, and enable them to develop into born children. Moreover, *Donum Vitae* does not consider the act of implantation separate from *in vitro* fertilization. The document instead focuses on IVF,

¹²⁴ *Donum Vitae*, I-5.

¹²⁵ Ibid.

¹²⁶ Stempsey, 31.

surrogacy, and research on embryos, which were the emerging technologies of the time, and treats them as “packaged” technologies or social practices.

If this failure to address embryo donation was an accidental omission, and the Church intended to indicate its disapproval of embryo donation, the CDF had the opportunity to correct this in its 2008 document, *Dignitas Personae*. In it, for the first time, the CDF addressed both embryo transfer as a treatment for infertility and “prenatal adoption.”¹²⁷ Although the document dismisses embryo donation “as a *treatment for infertility*,” it only addresses “prenatal adoption” by suggesting it presents “various problems not dissimilar to those mentioned above [regarding IVF and surrogacy].”¹²⁸ There is no further discussion of the reason that such a procedure would be illicit, or an examination of the morality of embryo transfer per se. The section concludes with a vague statement from Pope John Paul II, which suggests that the door has not been closed on the moral permissibility of embryo donation: “[T]here seems to be no morally licit solution regarding the human destiny of the thousands and thousands of ‘frozen’ embryos which are and remain the subjects of essential rights and should therefore be protected by law as human persons.”¹²⁹ This statement, in contrast to the statement from *Donum Vitae* that addressed embryonic research, applies directly to the option of embryo donation, and states that there *seems* to be no licit solution, not that no licit solution exists. While *Donum Vitae* is explicit about the Church’s prohibition of procedures that would destroy the embryo, *Dignitas Personae* does not definitively condemn heterologous embryo transfer (HET) in all contexts as intrinsically immoral.

¹²⁷ *Dignitas Personae*, sec. 19.

¹²⁸ Ibid.

¹²⁹ *Dignitas Personae*, sec. 19.

John Berkman also presents a possible interpretation of the passage from *Donum Vitae*, arguing that the meaning of “spare” embryos is at the core of the misunderstanding.¹³⁰ For Berkman, the spare embryos referred to in *Donum Vitae* are “those that are destined *not* to be implanted and not...those that *could* be implanted.”¹³¹ The destruction of the embryos is the “absurd fate” referred to in *Donum Vitae*, and Berkman claims that the passage is descriptive (saying the embryos are not going to be implanted) and not prescriptive (declaring that the embryos *should not* be implanted).¹³²

3. Embryo Transfer is Intrinsically Immoral

Gestational surrogacy requires *in vitro* fertilization to create the embryos, transfer of those embryos to the surrogate’s uterus, and the promise that the surrogate will give the child to the intended parents after birth. Although the Church condemned this process IVF and embryo transfer as understood in the context of gestational surrogacy, many claim that even after conception has occurred *ex vivo*, the act of implantation itself, regardless of the circumstances, is wrong. Mary Geach, a philosopher, presents one of the strongest arguments against the permissibility of embryo donation in the Catholic tradition by arguing that embryo transfer is intrinsically immoral. Geach claims that just as *in vitro* fertilization is immoral because it imitates and replaces the marital act, any act of impregnating a woman through means other than sexual intercourse with her husband, including embryo donation, similarly imitates and replaces the marital act and the fruits that are intended to flow from that act, and is thus immoral.¹³³

¹³⁰ Stempsey, 31.

¹³¹ Ibid.

¹³² Stempsey, 31.

¹³³ May, 96; Tollefsen, 88.

Geach argues that HET is never acceptable, and cannot be saved by a couple's noble intention to "rescue" or "adopt" a frozen embryo.

Although scholars such as Christopher Tollefsen have argued that fertilization and implantation are morally distinct acts, and only fertilization is a per se violation of the Church's teaching on the dual purpose of the marital act, Geach argues that the definition of the marital act necessarily includes the possibility of pregnancy, because sexual intercourse is "an act of admission whereby [the woman] allows a carnal intromission of an impregnating kind."¹³⁴ She claims that just as in sexual intercourse, "the wife permits intromission of the husband's semen... the function of which is to make her pregnant," embryo transfer is an intromission of an embryo, "the function of which is to make [that woman] pregnant."¹³⁵ Being open to becoming pregnant, then, is part of the marital act and integral to its generative function. If this were true, then any act that makes a woman pregnant outside of the marital/generative act cannot be licit, which would include embryo donation.

Catherine Althaus agrees with Geach's argument, and does not see IVF and HET as separate acts of individual moral significance; instead, she argues that although conception "grants life to the child and makes the woman and man parents, pregnancy is part of the procreative process because it *uniquely*: 1. Develops the woman as a mother, 2. Sustains and develops the life of the child [and] 3. Sustains the paternity of the father."¹³⁶ Reverend Tadeusz Pacholczyk holds a similar view, claiming that the essence of the Church's condemnation of surrogacy is "the decision of a woman to receive an embryo into her uterus in a way other than

¹³⁴ Mary Geach, "The Female Act of Allowing an Intromission of an Impregnating Kind," in *Human Embryo Adoption: Biotechnology, Marriage, and the Right to Life*, eds. Thomas v. Berg and Edward J. Furton (Philadelphia and New York: The National Catholic Bioethics Center and the Westchester Institute for Ethics and the Human Person, 2006), 261.

¹³⁵ Tollefsen, 88.

¹³⁶ Althaus, 65.

as a consequence of conjugal relations with her husband or with another man.”¹³⁷ Embryo donation is thus similar because the woman allows herself to be impregnated with an embryo that was not the result of a conjugal act.

Christopher Tollefsen defends embryo donation by arguing against the intrinsic immorality of HET in two ways. First, he claims that “the complementarity *necessary* for there to be a union of two in one flesh is exhausted in certain facts of generation itself.”¹³⁸ By this, Tollefsen means that the union necessary for a moral marital act according to the Church occurs when the spouses perform the type of act oriented to reproduction, which does not make use of contraception and is open to life. This marital union occurs whether or not reproduction is actualized; if this were not so, then no act of intercourse between spouses would be properly considered a “marital act.” This is contrary to the Church’s teaching that any sexual act oriented toward the union of spouses and *open* to procreation is a marital act, even if that act does not result in procreation.

Second, Tollefsen takes issue with Geach’s claim that the man “makes the female pregnant” as part of his proper role in the marital act, and any procedure that replaces that male act of “making pregnant” is an imitation of the marital act, and therefore illicit.¹³⁹ He begins by arguing that using this language perpetuates a “false biology” that the man takes the active role in reproduction, while the woman is passive.¹⁴⁰ Geach relies on the idea that the man’s active role of making pregnant means that the possibility of pregnancy is necessarily part of the marital act, but Tollefsen says that neither the man nor the woman individually makes her pregnant,

¹³⁷ Reverend Tadeusz Pacholczyk, “On the Moral Objectionability of Human Embryo Adoption,” in *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, eds. Sarah-Vaughan Brakman and Darlene Fozard Weaver (Springer Science + Business Media B.V., 2007), 78.

¹³⁸ Tollefsen, 90.

¹³⁹ *Ibid.*, 94.

¹⁴⁰ *Ibid.*, 95.

because both take an active role in reproduction.¹⁴¹ In fact, he claims it can be said that once the egg is fertilized, the newly existing embryo makes the woman pregnant through its own self-directed development.¹⁴² Regardless of the “cause” of pregnancy, however, Tollefsen claims that neither the woman nor the man make her pregnant, but rather engage in the marital act which is the type of act that could generate life and lead to pregnancy.¹⁴³ The marital act is satisfied by a sexual act that is unitive and procreative in its nature, which is “apt for bringing together sperm and an egg,” not that which “makes pregnant.”¹⁴⁴ Therefore, since the marital act is not an act of “making pregnant,” the act of transferring an embryo into a woman’s womb, which *is* an act of “making pregnant,” cannot be considered an imitation of the marital act. Embryo transfer is thus not illicit by virtue of replacing the marital act.

Just as Tollefsen delineates between “making pregnant” and the marital act, one can also argue that it is not “being pregnant” that makes a woman a mother or “making pregnant” that makes a man a father, because men and women can be parents without experiencing pregnancy or a genetic relationship to the child. Althaus relies on a passage in *Donum Vitae* that argues that spouses have a “right to become a father and a mother only through each other,” to support her opposition to embryo donation.¹⁴⁵ She argues that a woman who allows herself to become pregnant with a child that is not genetically related to her husband leaves her husband out of procreation and therefore violates the principle of marital chastity.^{146,147} However, a woman does

¹⁴¹ Ibid.

¹⁴² Ibid., 97.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ *Donum Vitae*, A-1.

¹⁴⁶ Althaus, 51.

¹⁴⁷ “Chastity means the successful integration of sexuality within the person... [It] involves the integrity of the person and the integrality of the [mutual gift of spouses].” *Catechism of the Catholic Church*, sec. 2337; “These techniques (heterologous artificial insemination and fertilization)... betray the

not become a “mother” solely by virtue of a pregnancy. For example, the woman of an adopting couple does not experience pregnancy with that child, but the adopting parents are still correctly considered mother and father through adoption. Likewise, the Church calls a man and a woman who undergo IVF “parents” even while their embryos are still frozen and have never been implanted.¹⁴⁸ According to the Church, man and woman become father and mother when they either generate a child biologically or adopt a child legally, not when a woman’s pregnancy begins. Although Althaus argues that in embryo donation a woman would become a mother through the pregnancy while the man would be excluded from the process, in fact the woman and the man would become mother and father at the same time: the moment they consented to and completed the necessary legal steps to take “custody” of the embryo. As in adoption of born children, the spouses would become mother and father through their mutual consent to adopt the embryo, not through the ensuing pregnancy and birth.

4. Those Who Engage In Embryo Donation are Complicit in IVF

Tracy Jamison presents the argument that embryo donation cooperates “in the evil of artificial fertilization.”¹⁴⁹ In Catholic moral teaching, the morality of acts committed by someone cooperating with a wrongdoer can be evaluated through the classifications of formal and material cooperation.¹⁵⁰ In formal cooperation, “the cooperator agrees with and intends the procedure.”¹⁵¹

spouses’ right to become a father and a mother only through each other.” *Catechism of the Catholic Church*, sec. 2376.

¹⁴⁸ *Dignitas Personae*, 18.

¹⁴⁹ Tracy Jamison, “Embryo Adoption and the Design of Human Nature: The Analogy Between Artificial Insemination and Artificial Impregnation,” *The National Catholic Bioethics Quarterly* 10, no. 1 (Spring 2010): 113.

¹⁵⁰ James F. Keenan and Thomas R. Kopfensteiner, “The Principle of Cooperation: Theologians Explain Material and Formal Cooperation,” *Health Progress* (April 1995): 23.

¹⁵¹ David F. Kelly, *Contemporary Catholic Health Care Ethics* (Washington, D.C.: Georgetown University Press, 2004), 121.

Formal cooperation with a person committing an evil act is always forbidden.¹⁵² With indirect or material cooperation, an action is permitted if it is sufficiently removed from the evil act, there is no danger of scandal, and there is a proportionate reason to engage in the activity.¹⁵³ This concept is often used in the context of abortion, where nurses or other healthcare workers are required to perform job duties related to abortion procedures.¹⁵⁴ Where a nurse may be allowed to set up tools used in the abortion if this duty is only a small part of his or her job, that nurse “would probably not be permitted to work at an abortion clinic.”¹⁵⁵ In material cooperation, “the more remote the ... cooperation, the more likely it is to be right.”¹⁵⁶

Jamison suggests that the participation in embryo donation, which relies on IVF to provide the embryos that will be donated, cooperates in the illicit IVF action.¹⁵⁷ However, simply because the action could not be taken unless the illicit act (IVF) had been performed does not imply that the separate and distinct act of embryo adoption cooperated in the original illicit act. As understood in Catholic teaching, embryo donation would be a remedial action to correct the unfortunate circumstances caused by the illicit IVF procedure. As previously argued, the act of embryo transfer itself is not intrinsically immoral, and is therefore a morally indifferent action that is only illicit if carried out in illicit circumstances, such as within a comprehensive IVF-ET therapy.

Analyzed in terms of formal and material cooperation, one must examine both the object and the intention of the act to determine the degree of complicity. The object of embryo donation is the medical transfer of a frozen embryo into a uterus to provide the opportunity to

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ Jamison, 113.

develop and flourish. The intention is twofold: to “save” the embryo from what the Catholic Church calls an “absurd fate,” and to remedy the deprivation of rights of the embryo caused by IVF.¹⁵⁸ The object of the wrongdoers, who, in this case, are the patients who began IVF to create embryos, was to fertilize an ovum outside of the conjugal act, and subsequently implant the embryo in the uterus. Their intention was to circumvent the conjugal act to provide them with a child through reproductive technologies. Those who participate in embryo donation to provide an environment in which the embryo may flourish do not engage in, nor intend, the object of procreating outside of the marital act. Furthermore, embryo donation does not enable the practice of IVF in any way, because the act of embryo donation does not contribute to, aid, or facilitate the *ex vivo* fertilization of an ovum, which is the morally impermissible object. It is through this separation of the act of fertilization and the act of implantation that embryo donation is properly considered a corrective intervention in, and not cooperation with, an illicit process.

D. THE EMBRYO IS A CHILD

One of the Catholic Church’s clearest teachings is, “The human being is to be respected and treated as a person from the moment of conception; and therefore from that same moment his rights as a person must be recognized, among which in the first place in the inviolable right of every innocent human being to life.”¹⁵⁹ In the Catholic tradition, embryo donation must be approached from this foundational principle: the frozen embryo is a human person in need of the environment in which it can grow and flourish. Although Catholic arguments against embryo donation recognize this personhood, they contend that the process of transferring the embryo into

¹⁵⁸ *Donum Vitae*, I-5.

¹⁵⁹ *Donum Vitae*, I-1.

a womb violates the dignity of the woman and her husband, which would lead one to believe this dignity is more important than the life of the embryo.¹⁶⁰

The Church, however, has recognized the embryo's dignity and teaches that embryonic life must be supported and protected absolutely.¹⁶¹ In fact, the Church stated in *Donum Vitae*, "One must uphold as licit procedures carried out on the human embryo which...are directed towards its healing, the improvement of its condition of health, or its individual survival."¹⁶² This statement was not accompanied by a limitation on procedures that have an impact on the woman's well being, either physically, psychologically, or morally. Instead, the Church emphasizes the moral worth of the embryo and explains the lengths to which medicine may go to support the health or life of the embryo. In cryopreservation, the embryo is unable to develop. It does not grow, nor obtain nutrients, because it is frozen in its development. Embryo donation seeks to provide the embryo with basic human needs, such as shelter and nutrition, which are necessary for human flourishing but are denied to those in cryopreservation.¹⁶³ HET in this situation would be a "procedure carried out on the human embryo which...[is] directed towards...its individual survival."¹⁶⁴ According to the Church's own teaching, such a procedure "must be upheld as licit" because it is a life-improving intervention for the embryo and would save the embryo from eventual deterioration, according to the teaching that the frozen embryo is a life.¹⁶⁵ Without implantation, the embryo is denied access to its normal course of development.

¹⁶⁰ See, e.g., Pacholczyk, "On the Moral Objectionability of Human Embryo Adoption"; Althaus, "Human Embryo Transfer and the Theology of the Body."

¹⁶¹ Holy See, *Charter of the Rights of the Family*, October 22, 1983, Vatican Website, http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_famly-rights_en.html, art. 4.

¹⁶² *Donum Vitae*, I-3.

¹⁶³ *Catechism of the Catholic Church*, sec. 2288.

¹⁶⁴ *Donum Vitae*, I-3.

¹⁶⁵ *Ibid.*

As previously stated, the Church teaches that because life begins at conception, “[that] child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage.”¹⁶⁶ IVF severs the first right from the other three; it takes away the right of what the Church considers to be a child to be conceived in the womb. Likewise, gestational surrogacy not only takes away the right to conception in the womb, but also the right to be carried by and born to the child’s mother. Embryo donation seeks to remedy the loss of the first right by offering the embryo the womb of its new mother and the prospect of being born to and raised by that same mother. While the Church maintains the absolute right of the child to these four conditions, it has not addressed the question of whether, if one right is violated, actions can be taken to provide the other rights in an attempt to remedy that loss. It is clear from the Church’s embrace of the adoption of born children that it does not condemn all practices in which one or more of these rights have been violated. For example, if a woman conceives a child that she is unable to care for, but carries and gives birth to the child, she may give her child to another in adoption. The child’s fourth right, to be raised by his genetic parents, has been sacrificed, but in many cases such a sacrifice is licit.¹⁶⁷

While embryo donation involves more intricate and intimate procedures to enable couples to fulfill rights of an embryo than post-birth adoption, the purpose of both embryo donation and post-birth adoption are to provide the basic needs of human flourishing, which should not be forsaken to protect the concept of marital chastity. If the Church determines that, after the right to be conceived in the womb is violated in IVF, all of the other rights must be sacrificed as well to preserve marital chastity, then the Church is essentially prioritizing the virtue of chastity over the right to life.

¹⁶⁶ Ibid., II-A-1.

¹⁶⁷ *Catechism of the Catholic Church*, sec. 2379.

This prioritization of marital chastity over life is inconsistent with many other Church teachings that elevate life to the highest standard, requiring in almost every case that life be upheld whenever there is a conflict between life and another competing interest. In cases of rape, for example, the Church recognizes sexual assault as intrinsically evil, but does not permit a female victim to take emergency contraception if there is any possibility that she may have conceived between the time of the rape and the time she sought medical treatment, even if a pregnancy cannot be verified. The Ethical and Religious Directives for Catholic Health Care Services identify the situations in which contraception may be obtained.¹⁶⁸ Directive 36 recognizes that a woman has the right “to defend herself against a potential conception from the sexual assault,” but medications to prevent this conception may only be administered “[i]f, after appropriate testing, there is no evidence that conception has occurred already.”¹⁶⁹ While many in the scientific community place pregnancy at the time of implantation,¹⁷⁰ the Church teaches that pregnancy begins at fertilization.¹⁷¹ Therefore, many Catholic hospitals require ovulation testing if a pregnancy test is negative to determine if there is any possibility that the rape victim could have conceived between the time of her rape and when she sought medical treatment. If this possibility exists, emergency contraception will not be dispensed. This limitation exists to protect the potential fertilized ovum, as one of the potential effects of emergency contraception is to interfere with the implantation of the embryo into the uterus. Due to the difficulty in identifying the occurrence of fertilization until 10-14 days after conception, or around the time of implantation, the practical effect of this requirement according to the National Catholic

¹⁶⁸ United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services*, 5th ed (Washington, D.C.: USCCB, 2009), 36.

¹⁶⁹ *Ethical and Religious Directives*, 36.

¹⁷⁰ Guttmacher Institute, *The Implications of Defining When A Woman Is Pregnant*, <http://www.guttmacher.org/pubs/tgr/08/2/gr080207.html> (accessed March 25, 2011).

¹⁷¹ *Ethical and Religious Directives*, 45

Bioethics Center is that the only moral use of emergency contraception in cases of rape is to prevent ovulation.¹⁷²

This Catholic policy illustrates the Church's strong preference to protect not only embryonic life, but also potential embryonic life, even if it greatly burdens others. A woman who has been the victim of rape may face debilitating consequences such as post traumatic stress disorder, depression, and shame or guilt that may be projected onto the child if she becomes pregnant and must carry the child to term, even if she ultimately gives that child up for adoption.¹⁷³ Still, the Church maintains that the embryo she conceives, although a product of a horrific act, is an innocent child who must be protected and given priority over the woman's well being. If embryonic life is elevated above the overall health of a female rape victim, then it would be inconsistent for the Church to maintain that chastity should be protected above life in the case of embryo donation. Catholic bioethics maintains that life should always be protected; this principle should include "lives" that can be protected and nurtured if they are provided a womb.

¹⁷² Marie T. Hilliard, *Dignitas Personae* on Caring for Victims of Sexual Assault, A Commentary on *Dignitas Personae*, Part Two, <http://www.ncbcenter.org/NetCommunity/Page.aspx?pid=1009> (accessed February 23, 2011).

¹⁷³ See South Eastern Center Against Sexual Assault, "Pregnancy Following Rape," http://www.secasa.com.au/infosheet/infosheet_1003.pdf (accessed March 16, 2011).

IV. THE ADOPTION SOLUTION

Reconceptualizing the practice of embryo *donation* as embryo *adoption* can solve both the legal problem of regulation discussed in chapter two and the Catholic ethical concerns discussed in chapter three. This solution is not an issue of rhetoric, using the language of adoption to advance a belief that persons exist from the moment of conception; it is a substantive change in approach that provides the necessary legal and ethical frameworks to adequately confront and encourage this reproductive practice.

In the narrow context of the transfer of a frozen embryo to a genetically unrelated couple who wishes to implant, gestate and raise the resulting child as their own, traditional principles of adoption should govern the arrangement to ensure the transfer of future parental rights is permanent and to safeguard the interests of all involved. Although the embryo is not legally a person, it is possible to confer upon it certain rights that allow it to be the subject of an adoption proceeding without investing it with personhood status or abrogating recognized reproductive rights.

States should have flexibility in determining the specific requirements for the proceeding, as they do in adoption of born children, but generally the process should include a background check of the adoptive parents, a home study, and a judicial declaration of adoption.¹⁷⁴ This proceeding should occur at the time of transfer, allowing for a statutorily determined period of

¹⁷⁴ Margaret C. Jasper, *The Law of Adoption* (New York: Oxford University Press, 2008), 1.

time for the donors to revoke their consent to the adoption before the embryo is implanted into the gestational mother. Once the adoption has been finalized and the embryo is transferred to the gestational mother's womb, the adoptive parents should be treated legally as if they had conceived the child without the use of the assisted reproductive technologies that may call their parental status into question. This treatment would include not only full parental rights once the child is born, but also full reproductive liberties that apply to a pregnant woman, including the right to obtain an abortion. This framework, properly applied to the narrow context of embryo donation, can resolve ambiguities in both the law and in private reproductive arrangements while facilitating this practice as an option for individuals and couples with frozen embryos they are unable or unwilling to gestate themselves.

A. EMBRYO ADOPTION IN THE LAW

It seems that legislatures have maintained a contract approach to regulation of embryo donation to prevent challenges to, and an encroachment of, reproductive rights that have been historically held to be fundamental constitutional liberties. However, states also have an interest in ensuring that these agreements are upheld where they are made, minimizing legal challenges to arrangements that involve the gestation and future custody of children. Utilizing an adoption framework to regulate this kind of embryo transfer can not only provide assurance of the permanence of the arrangement, but also work with current reproductive jurisprudence without eroding these rights.

1. Protects Interests by Providing Permanence

In embryo donation, three parties have interests in the agreement: the donor(s), the donee(s), and the state. The donors may have an interest in knowing who will receive their embryos, because some donors may feel that their embryos are their children.¹⁷⁵ Even for those who do not believe their embryos are their children, they may nonetheless still be invested in the embryos' futures, expressing concern about the lives their future genetic children may experience without their genetic parents or siblings.¹⁷⁶ This concern for their future genetic children could lead some donors to desire some control over the selection of adoptive parents, which is not currently always available in embryo donation.¹⁷⁷

The donees also have an interest in seeking assurance that the agreement they are entering into, which may lead to the birth of a child if the embryo implants and biology allows, is and will remain valid and enforceable. As the "adoptive parents" of the embryo, their intention and hope is to become parents through this arrangement. Just as it seems unfair that, despite signing an gestational surrogacy agreement, the intended parents in a surrogacy arrangement could be faced with a custody challenge by the gestational surrogate who seeks to prevent the intended parents from parenting the child they hoped for, it is also unfair that donees could enter into an agreement to transfer the embryos and achieve pregnancy and birth without having the confidence that their parental rights will not be challenged.

¹⁷⁵ See, e.g., Embryo Adoption Awareness Center, www.embryoadoption.org (accessed March 23, 2011); Nightlight Christian Adoptions, www.nightlight.org/adoption-services/snowflakes-embryo (accessed March 23, 2011).

¹⁷⁶ Ibid.

¹⁷⁷ Private agencies such as Nightlight Christian Adoptions, which runs the Snowflakes Frozen Embryo Adoption and Donation Program, address these interests by applying a traditional adoption process, including a home study.

The state's interest in the agreement between parties is similar to its interest in both the abortion context, which identifies the interest in potential life, and the adoption context, which centers on the interest in protecting the health and welfare of the child. Courts have recognized that the interest in potential life is minimal before the fetus reaches viability when compared to a woman's bodily privacy; however, in the context of embryo adoption, this interest is not insignificant because the state is involved in the placement of the embryo for gestation, not merely its general disposition. While this interest in potential life alone may not be compelling, and, because the embryo is not a born child, the state interest in the welfare of the child is not yet actualized, these two interests considered together justify state approval and regulation of embryo adoption. This dual analogy is appropriate to illustrate that the state has an interest in the potential life while the embryo is still developing, but should have a prophylactic interest in the future child's best interests, because the embryo adoption arrangement has as its goal the birth of a child to genetically unrelated parents.

In traditional adoption, as with custody cases, the state has a strong interest in protecting the health and life of the child and thus places the child's best interests first in any custodial decisions.¹⁷⁸ Because states are often involved in adoptions, they have passed laws regulating adoption procedures to ensure proper screening of adoptive families out of a concern for the well being of the child that is being placed.¹⁷⁹ By analogy, in embryo adoption, the state has an interest in the potential life because the agreement at issue is precisely one that controls custody of what will develop into a born child. The agreement contemplates a born child as the result, and the state has an interest in ensuring that the resulting child, much as in traditional adoption, is placed with an appropriate family.

¹⁷⁸ Cynthia R. Mabry and Lisa Kelly, *Adoption Law: Theory, Policy, and Practice* (New York: William S. Hein & Co., 2010), 161.

¹⁷⁹ Mabry and Kelly, 160-61.

By providing judicially supported permanence of the arrangement, embryo adoption would address and protect the interests of each of these parties. As previously argued in chapter two, the use of contract law to govern embryo donation is not sufficient to prevent legal challenges to custody even after the agreement is executed and the child is born. The legal vehicle state legislatures have chosen to allocate parental rights where there are no natural parents, or the natural parents have petitioned the court to relinquish parental rights, is adoption. It is only after the legal parents have died, or the court has terminated a parent's parental rights, that the issue of temporary or permanent custody can be decided.¹⁸⁰ It is through these procedures – termination of parental rights and adoption – that the parents and the child have finality in the decision that is made. Under current regulations, which prohibit adoption before birth, although embryo donation contracts are often upheld in hindsight by courts, they are nevertheless contingent upon the parties' cooperation after birth with any subsequent adoption requirements. Allowing embryos to be adopted would eliminate this uncertainty, definitively naming the donee parents as the legal parents before implantation, and substantially protecting the adoptive parents from custody challenges after birth.¹⁸¹

Adoption would also protect the donors, who often wish to be involved in the process of finding an adoptive family. For those who may believe that their embryos are their children, or who are concerned about the families who will raise what would be their biological children once they are born of the gestational mother, it may not be enough to sign a contract promising to relinquish future parental rights without the knowledge that the embryos will be given to what

¹⁸⁰ Mabry and Kelly, 17.

¹⁸¹ Adoptions can be challenged on procedural or substantive grounds, such as a lack of adequate consent of the birth parents or the misrepresentation of a child's medical history that affected the adoptive parents' decision to adopt. However, courts require challengers to prove by clear and convincing evidence that the "dissolution should be ordered on the ground presented and...would be in the child's best interests." Mabry and Kelly, 629.

they would consider to be a suitable family. Although not all adoptions are facilitated by state agencies, state legislatures have established requirements for most adoptions, which include long applications, background checks, interviews, and a home assessment performed by a licensed social worker or other approved professional.¹⁸² These steps are in place to determine whether the prospective parents would be fit to adopt a child, which attempts to ensure the safety and well being of the child to be placed. With this information, the court then makes a determination based on the best interests of the child being adopted about whether the adoptive parents should be allowed to adopt that child.¹⁸³ Although the embryo is not a person, the gift of an embryo to a couple for purposes of gestation is a gift of potential parenthood: it is done with the intention that the recipients will become parents of the resulting child. While implantation of the embryo does not guarantee that a pregnancy will produce a healthy viable child, the intent of the contract is to have the donated embryo gestated to term by the donee mother; therefore, the well being of that future child should be considered in the initial agreement to donate. The procedures currently required for adoption of born children would therefore be both appropriate and beneficial for the parties involved in the donation, because they would reassure the donors that a suitable family will raise their genetic offspring, and abuses of the system that may result from a lack of oversight of donee families could be prevented.

Adoption could also address ancillary issues such as inheritance rights of the resulting child and issues of privacy relating to family genetic history that may be of concern to the donors. In adoption of born children, inheritance is determined by statute, and the parties have the right to include provisions in the adoption agreement that determine whether they will maintain an open or closed adoption, allow access to the family medical history, and any other

¹⁸² Mabry and Kelly, 152.

¹⁸³ Ibid., 161.

agreement the parties wish to make with respect to the raising of the adopted child.¹⁸⁴ These same statutory definitions of the relationship of the parties to the resulting child and the ability to include provisions relating to the child's life could be provided through adoption of embryos, giving donors more freedom in these arrangements and greater confidence in the legal relationships that may result.

The home assessment and background check requirements ancillary to adoption proceedings would also satisfy the state's interest in potential life and the best interests of the future child in a similar way. Inquiring into the adoptive family's history and lifestyle would ensure that the child resulting from the donation would be placed in a home that would be in his or her best interest. Courts also would not be left to look back at the contract to determine parentage if the donor family challenges custody, because custody and parental rights would be judicially declared from the beginning, minimizing the emotional toll on both the donor and donee families, as well as the child that may be born of the arrangement. This would not preclude courts from looking back to the terms of the adoption to determine issues ancillary to the adoption, such as whether the adoptee or the adoptive parents are entitled to the child's medical or family history.

The state could further protect the potential life and the best interests of the future child by addressing practical issues, such as guardianship of the embryos where the original custodians cannot be found or have relinquished the embryos, and limits on the number of embryos that may be adopted at one time. It may be prudent to establish a neutral third party as the guardian of embryos available for adoption to prevent a conflict of interest from arising if the physician who stands to gain from performing an embryo transfer in embryo adoption is responsible for

¹⁸⁴ Mabry and Kelly, 503-19.

protecting the rights of that embryo. It may also be advisable for states or private agencies to place a limit on the number of embryos that may be adopted at one time based on standards of reproductive medicine, because implantation of more than one embryo may pose a risk to the developing fetuses, which would stand in contrast to one of the purposes of embryo adoption, which is to protect the best interests of the developing child.¹⁸⁵ Such provisions, however, should be left to state legislatures to determine based on the reproductive practices in the jurisdiction and the construction of the embryo adoption laws.

A prospective judicial determination of parentage through adoption would also establish the kind of permanence that contract law does not provide in reproductive arrangements. Under contract regulation, reproductive agreements could be challenged based on allegations of fraud, coercion, or another legal basis, allowing for legal remedies that are not appropriate in the context of embryo donation. Although adoptions can also be challenged on similar grounds and subsequently dissolved, “Courts are reluctant to dissolve a final adoption decree,” and will only do so after “extraordinary circumstances or unusual facts” are established.^{186,187} This high burden, as well as the safeguards such as a background check and home study that are performed before the adoption could be permitted, would afford greater protection to the adoptive parents of an embryo against legal challenges than contract law could. Once the court has terminated the parental rights of the original parents and invested the adoptive parents with full parental rights and custody, it is rare that there would be a challenge to the validity of the proceeding for either party involved.¹⁸⁸ The length and complexity of the proceeding ensures that both parties understand fully the rights at issue, and not only are the donors more protected from fraud, but

¹⁸⁵ American Society for Reproductive Medicine, “Guidelines,” 1518-19.

¹⁸⁶ Mabry and Kelly, 629.

¹⁸⁷ Reports estimate that between 0.4% and 10% of adoptions are dissolved after an adoption is finalized. Mabry and Kelly, 611.

¹⁸⁸ Mabry and Kelly, 611.

also the donees have greater protection from future legal challenges to their custody. Allowing embryos to be adopted instead of donated by contract would reassure both the donors and the donees that their agreement is valid and permanent.

2. Does Not Affect Reproductive Rights

Allowing embryos to be adopted instead of donated would not have a negative impact on constitutionally protected privacy issues. It is possible for states to apply the adoption paradigm without commenting on the moral status of the embryo, as has been demonstrated in Louisiana.¹⁸⁹ Although Louisiana's system of law is unique due to its roots in the French legal system, the same concepts can be translated into the English-based system used throughout the country. Also, while this proposed system of embryo adoption uses the juridical person framework to explain how adoption can govern embryo donation, this designation is not necessary as long as the principles adopted are substantially similar and afford the same legal rights and protections to the embryo to be adopted.

In Louisiana, cryogenically preserved embryos are termed "juridical persons" while they remain outside of the uterus, which provides them with some of the legal protections accorded to born persons without elevating them to a "full personhood" status.¹⁹⁰ The concept of the juridical person is most commonly applied to corporations, which exist as an individual entity, a "fictional person" for purposes of legal reasoning, which may sue and be sued.¹⁹¹ Also known as an artificial person or legal person, this "entity is a person for purposes of the Due Process and Equal Protection Clauses but is not a citizen for purposes of the Privileges and Immunities

¹⁸⁹ *Louisiana Revised Statutes*, sec. 9:123 (2011).

¹⁹⁰ *Louisiana Revised Statutes*, sec. 9:123 (2011).

¹⁹¹ *Black's Law Dictionary*, 9th ed.

Clauses.”¹⁹² While it is clear that a corporation is not a natural person,¹⁹³ it is necessary to treat it as an individual for continuity of the business and for other legal reasons relating to litigation and protection of shareholders. This designation as juridical person does not confer full rights of personhood on a corporation, nor would it do so for an embryo. In the Louisiana embryo adoption law, the embryo as a juridical person is only a “person” insofar as it can be the subject of an adoption proceeding before implantation; it loses this status once the adoption is complete.¹⁹⁴

Just as a corporation can be dissolved and no longer exist as a juridical person, the legal custodians of an embryo would still retain the right to discard or donate their embryo for research. The juridical person designation is meant to facilitate the legal mechanism of adoption, not to remove already-existing rights. For this reason, allowing the embryo to be adopted under this framework would not prohibit the progenitors’ right to discard their embryos; it merely strengthens the legal foundation of one of the many options available to custodians of frozen embryos. Although states may exercise the option of prohibiting certain dispositions such as donation for research, the juridical or artificial person status does not require nor entail that legislative action.

Also, just as the designation does not affect the options for disposition of frozen embryos, it also would not affect reproductive privacy rights such as abortion, either for the adoptive mother in embryo adoption or any woman pregnant by other means. Although the state has an interest in potential life, this interest is only significant when the state is involved in the placement of the potential life, as in embryo adoption, or when the fetus has reached viability, as

¹⁹² *Black’s Law Dictionary*, 9th ed.

¹⁹³ A natural person is the legal term used to describe a born, living human being, as opposed to an artificial or legal person, which is a legal fiction created by statute. *Black’s Law Dictionary* 9th ed.

¹⁹⁴ *Louisiana Revised Statutes*, sec. 9:123 (2011).

in cases of elective late-term abortion. Conferring the status of juridical person on the frozen embryo to allow for pre-birth adoption does not confer full rights of personhood, and therefore does not increase the state's interest in potential life that has been explained in reproductive jurisprudence.¹⁹⁵

This mechanism of embryo donation would apply only during the adoption proceeding, and the “juridical person” or other similar designation would no longer apply once the adoption was complete. If the new adoptive custodians subsequently implant the embryo, it would be treated as if naturally conceived, and therefore all of the rights available to a woman who became pregnant by any other means would apply to the woman pregnant by embryo adoption. Even though she “adopted” the embryo, she would retain the right to have an abortion, because the purpose of the adoption proceedings is to ensure that if the child were carried to term, it would be raised by suitable parents, and those parents could be secure in knowing their custody will not likely be challenged. The apparent inconsistency that may exist in requiring an adoption of an embryo, but later permitting an abortion, may be resolved through this understanding that the adoption is procedural and intended to protect parental rights, not to redefine the moral status of the embryo or afford the embryo greater protection than embryos conceived through sexual intercourse. The purpose is not to abrogate the traditional rights of pregnant women based on a particular reproductive arrangement. Therefore, allowing adoption of frozen embryos would not affect current reproductive liberties nor change the options available to those wishing to discard or donate their embryos.

¹⁹⁵ See *Roe v. Wade*; *Planned Parenthood v. Casey*

B. EMBRYO ADOPTION IN THE CHURCH

The Catholic Church may be reluctant to recognize embryo adoption as a morally permissible practice because it does not want to lose ground on its strong teaching against many reproductive technologies that it considers to be offensive to human sexuality and the marital act.¹⁹⁶ The Church has emphasized that technologies aimed at overcoming infertility by circumventing the marital act are illicit despite their “understandable motivations.”¹⁹⁷ *Dignitas Personae* assumed in its discussion of embryo donation that this practice is another treatment of infertility, and thus illicit for the same reasons as heterologous IVF and gestational surrogacy.¹⁹⁸ However, this analysis examines the practice from a technological perspective instead of a human life-based perspective. As it was argued in chapter three, the act of embryo transfer is not *per se* illicit; therefore, the morality of the act depends on its circumstances. However, if the Church views the practice through the lens of adoption instead of reproductive technologies, separating the act of conception from the act of implantation, then embryo adoption and subsequent implantation offers a method of saving embryonic life without contradicting Catholic teaching on marriage and reproduction.

1. Ethical Analogy to Born Adoption

Donum Vitae states, “From the moment of conception, the life of every human being is to be respected in an absolute way.”¹⁹⁹ For the Church, the embryo is a child, with all of the rights of personhood afforded to born individuals. Personhood is to be respected at all stages of development, from conception to natural death; this requires not only provision of basic human

¹⁹⁶ See Brakman and Weaver, 16-17.

¹⁹⁷ *Donum Vitae*, II-A-2; *Dignitas Personae*, sec. 16.

¹⁹⁸ *Dignitas Personae*, sec. 19.

¹⁹⁹ *Donum Vitae*, sec. 5.

needs, but also the protection of life itself.²⁰⁰ This is recognized in the Church's approval of adoption of born children and its recognition of the generosity shown by those who choose to do so.²⁰¹ The Church even facilitates adoptions around the world through its affiliation with Catholic Charities, an organization of charities that includes a private adoption agency.²⁰² The Church encourages this gift of family, which provides children with a family that will ensure that their basic human needs are met and that provides an environment in which adopted children have an opportunity to flourish.²⁰³

If the embryo is a person according to the Church, equal in dignity and status to a born child, then adoption of the child at the embryonic stage should not differ ethically from adoption of a child after birth. Although the technical needs of the child at the embryonic stage, which include attachment to the mother in pregnancy, are vastly different than those required after birth, the basic human needs remain the same: nutrition, shelter, hydration, etc. Furthermore, the intentions of the parties involved are also the same: one set of parents wishes to relinquish parental rights, while another set wish to accept parental duties and rights and raise the child as their own. According to the Church's own teaching, a person is a person whether he or she is an embryo or a born child; when a child or an embryo is in need of a family, the stage of development should not determine whether a couple is ethically permitted to provide one.

Viewing embryo donation as a form of adoption also addresses the issue of husband and wife becoming parents only through one another in the marital act. In adoption, man and woman become parents through their mutual consent to welcome a child into their family as their own.

²⁰⁰ *Catechism of the Catholic Church*, sec. 2274.

²⁰¹ John Paul II, *Familiaris Consortio*, The Christian Family in the Modern World, November 22, 1981, Vatican Website, http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html, sec. 41.

²⁰² Catholic Charities USA, <http://www.catholiccharitiesusa.org> (accessed March 17, 2011).

²⁰³ *See Familiaris Consortio*, sec. 41.

Although they do not become genetic parents through the marital act, they become adoptive parents by agreeing to become the parents of a child in need of a home. Unlike IVF and artificial insemination, where the child is conceived outside of the marital act and the spouses become parents through technology instead of one another, in embryo adoption the spouses become parents through their mutual consent to parent the child that already exists as an embryo.²⁰⁴ The effect of embryo adoption is not procreation without sexual intercourse, but a true adoption of, according to the Church, a child, albeit an adoption that simply requires more technical care than adoption of a born child. The fact that a woman must become pregnant outside of the marital act in embryo adoption does not mean she “becomes a parent” without her spouse; on the contrary, it is their mutual consent to parent a child, along with the woman’s willingness to undergo pregnancy to care for their adopted child for the first nine months, that makes both husband and wife parents together, at the same time.

C. SHORTCOMINGS OF THE ADOPTION APPROACH

Although this proposal seems to satisfy the shortcomings in the law and the ethical uncertainty in the Catholic Church, it is not without its potential consequences. For the law, the language of adoption can be emotionally charged when applied to embryos, and although it was previously argued that embryo donation is not complicit in IVF, nevertheless the acceptance of embryo adoption by the Church may still be seen as tacit approval of IVF and other reproductive

²⁰⁴ It is important for this argument that the embryo has already been created. The Church teaches that fertilization outside of the marital act is illicit; therefore, if spouses give their mutual consent to become parents of an embryo that has not yet been created, they do not “adopt” the child, but engage in the illicit act of artificial procreation.

technologies. However, these possible effects of applying the adoption framework to embryo donation will likely be minor, and easily overcome by clarification of the scope of the practice.

1. Legal Implications

The reproductive rights cases establishing the legality of birth control and abortion were careful to avoid making a determination of personhood for an embryo or fetus and instead only reaffirmed that the embryo or fetus does not have the rights accorded to born persons in our legal system.²⁰⁵ To maintain legal access to abortion, legislatures and courts have also avoided language that implies personhood of the unborn, especially in reference to embryos in reproductive technologies.²⁰⁶ Terms such as “custody,” “adoption,” and even “child” have been avoided in this field because they suggest the embryo should be treated as a born child, who may be adopted or the subject of a custody dispute. The use of adoption to regulate embryo donation may cause concern among proponents of certain reproductive rights, such as abortion, because it is currently understood to apply to born persons. Calling the transfer of an embryo an “adoption” could lead to confusion about the legal and moral status of the embryo in light of a comparison between born adoption and embryo adoption.

Although this objection may be valid, it can be overcome by an express declaration by the legislature on the narrow application of the adoption framework in the context of embryo donation. It is possible to make it clear in the regulations that this “juridical person” is a legal fiction intended to circumvent the legal pitfalls of transferring embryos merely by contract law, not to confer rights of personhood. It is true that adoption most often refers to the permanent transfer of custody of a born person, but colloquially the term is also used to refer to the purchase

²⁰⁵ See *Roe v. Wade*; *Planned Parenthood v. Casey*.

²⁰⁶ See *Davis v. Davis*.

of pets. It is not the language of adoption that confers the rights of personhood, but the content of the law.

The language of adoption may also impact the debate over the ethical permissibility of embryonic stem cell research, which entails the destruction of the embryo for scientific purposes. While the embryo is still not legally considered a person, if embryo adoption is legally instituted, it may lead to a perceived inconsistency in the treatment of embryos. Although the morality of embryonic stem cell research is outside the scope of this project, it does not appear that embryo adoption will affect this practice. Some may argue that it is incoherent to allow the same embryos that are up for “adoption” to be taken apart for medical research. However, the same could be said for the criminal statutes that identify the killing of a fetus as murder, but only if it is done without the permission of the pregnant woman, and by a person who is not licensed to perform abortions. The moral status of the fetus does not change, but the law allows for a difference in the way it is treated. Likewise, the legal “change” in status of the cryopreserved embryo does not heighten its moral status, but is meant only to strengthen the process by which the embryo may be donated to another individual. It does not say that the embryo is a person when it is to be adopted, but not a person when it is to be donated for research; instead, it provides the legal basis for a permanent transfer of future parental rights when an individual wishes to gestate and raise the resulting child, while making no comment on the availability of other options for frozen embryos such as donation for research.

Finally, treating a pregnancy that results from embryo adoption the same as a naturally conceived pregnancy raises questions about the usefulness of the adoption framework after implantation. In traditional adoption, the adoption agency often visits the adoptive family at certain intervals after the adoption is finalized to evaluate the success of the placement and

ensure the adopted child is not in an abusive or otherwise harmful situation.²⁰⁷ Although parents of children born from natural conception are not subject to these parental evaluations, and after implantation the adoptive parents are considered the natural parents of the resulting child, this treatment as if naturally conceived does not preclude agency follow-up because it is intended only to preserve constitutionally-protected rights. The purpose of embryo adoption is to provide an embryo with the potential to develop when it otherwise would not have the opportunity. Where the state steps in to ensure the provision of this potential through allowing and regulating embryo adoption, it should also have the right to monitor the maintenance of that potential after birth. While these follow-up visits may not be necessary for embryo adoption, states may want to consider some process through which the safety and well being of children who are the result of embryo adoption can be verified, both for reasons of child protection and monitoring the outcomes of the embryo adoption process itself.

2. Catholic Considerations

Using the adoption framework to justify the morality of embryo donation in Catholic bioethics may be viewed as the Church's conditional approval of IVF, the procedure that yields the embryos that would be available for adoption, even if embryo adoption does not cooperate in the process. By providing an ethical option for custodians of frozen embryos, the Church may appear to condone not only the disposition of the embryo, but also the process by which the embryo is formed. From the Church's perspective, this could "result in scandal"²⁰⁸ by apparently legitimizing IVF," potentially leading others to believe that the practice of IVF is morally

²⁰⁷ Mabry and Kelly, 689.

²⁰⁸ "Scandal is an attitude or behavior which leads another to do evil." *Catechism of the Catholic Church*, sec. 2284.

permissible in Catholic teaching.²⁰⁹ It could also facilitate less responsible IVF practices, encouraging participants in IVF to fertilize more ova because it would be ethically permissible for these individuals to donate any unused embryos to others.

However, embryo adoption should not be viewed as a stumbling block for Catholic bioethical teaching, but as an ethical remedy for a seemingly impossible situation. If the Church allows embryo adoption as a solution to the problem of abandoned embryos, it can still continue to teach its doctrine that the process of creating the embryos is illicit. Just as the Church condemns acts of rape but protects any pregnancy that may result, the Church can continue to condemn the practice of IVF while protecting the embryo that was already created. By articulating a clear teaching that permitting embryo adoption is not a passive approval of IVF and other illicit reproductive technologies according to Catholic bioethics, the Church can avoid the appearance of inconsistent teaching.

The preservation of the right to abort the adopted embryo in this conceptualization of an embryo adoption framework is also inconsistent with Catholic teaching, but according to the legal landscape of the United States, is not a right that may be constrained regardless of the method used to achieve pregnancy. The Church may nevertheless approve embryo adoption while maintaining the impermissibility of abortion, because although abortion is a legal right, it is not necessary to embryo adoption, and therefore is a separate moral issue that does not impact the morality of embryo adoption.

²⁰⁹ Brandon P. Brown and Jason T. Eberl, "Ethical Considerations in Defense of Embryo Adoption," in *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, eds. Sarah-Vaughan Brakman and Darlene Fozard Weaver (Springer Science + Business Media B.V., 2007), 113.

V. CONCLUSION

Although there are still other options for custodians of embryos who no longer want them, those who choose embryo adoption should have the proper legal and ethical protections to safeguard the transfer. While the intention of this paper is not to integrate Catholic teaching with the law, it is possible to reconcile the difficulties that exist with embryo donation in each separate tradition through the implementation of embryo adoption. The benefits of instituting this framework far outweigh the potential pitfalls, and both the donor and donee families would be better served by having a clearer and stronger legal and ethical structure.

BIBLIOGRAPHY

1 Samuel Williston. *Contracts*, 4th ed. 1990.

A.Z. v. B.Z., 725 N.E.2d 1051 (Mass. 2000).

Althaus, Catherine. "Human Embryo Transfer and the Theology of the Body." In *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, edited by Sarah-Vaughan Brakman and Darlene Fozard Weaver, 43-68. Springer Science + Business Media B.V., 2007.

American Society for Reproductive Medicine. "Defining Embryo Donation."
http://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statements/DefiningEmbryoDonation.pdf.

American Society for Reproductive Medicine. "Guidelines on Number of Embryos Transferred." *Fertility and Sterility* 92, no. 5 (November 2009): 1518-19.

Brakman, Sarah-Vaughan, and Darlene Fozard Weaver. "Introduction: The Ethics of Embryo Adoption and the Catholic Tradition." In *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, edited by Sarah-Vaughan Brakman and Darlene Fozard Weaver, 3-23. Springer Science + Business Media B.V., 2007.

Brown, Brandon P. and Jason T. Eberl. "Ethical Considerations in Defense of Embryo Adoption." In *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, edited by Sarah-Vaughan Brakman and Darlene Fozard Weaver, 103-118. Springer Science + Business Media B.V., 2007.

Catechism of the Catholic Church, 2d ed. Washington: United States Catholic Conference, 1997.

Catholic Charities USA. <http://www.catholiccharitiesusa.org> (accessed March 23, 2011).

Congregation for the Doctrine of Faith. *Dignitas Personae*, Instruction Dignitas Personae on Certain Bioethical Questions. February 22, 1987. Vatican Website.
http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html.

Congregation for the Doctrine of Faith, *Donum Vitae*, On Respect for Human Life in its Origin and on the Dignity of Procreation, February 22, 1987, Vatican Website, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html.

Daar, Judith. "Litowitz v. Litowitz: Feuding Over Frozen Embryos and Forecasting the Future of Reproductive Medicine." In *Health Law & Bioethics*, edited by Sandra Johnson et. al., 97-119. New York: Aspen Publishers, 2009.

Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992).

Eisenstadt v. Baird, 405 U.S. 438 (1972).

Embryo Adoption Awareness Center. www.embryooption.org (accessed March 23, 2011).

Geach, Mary. "The Female Act of Allowing an Intromission of an Impregnating Kind." In *Human Embryo Adoption: Biotechnology, Marriage, and the Right to Life*, edited by Thomas v. Berg and Edward J. Furton, 251-272. Philadelphia and New York: The National Catholic Bioethics Center and the Westchester Institute for Ethics and the Human Person, 2006.

Georgia Code Annotated, sec. 19-8-41 (2010).

Guttmacher Institute. *The Implications of Defining When A Woman Is Pregnant*. <http://www.guttmacher.org/pubs/tgr/08/2/gr080207.html>.

Hilliard, Marie T. *Dignitas Personae* on Caring for Victims of Sexual Assault, A Commentary on *Dignitas Personae*, Part Two. <http://www.ncbcenter.org/NetCommunity/Page.aspx?pid=1009>.

Holy See. *Charter of the Rights of the Family*. October 22, 1983. Vatican Website. http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html.

Idaho Code Statutes Annotated, sec. 18-907 (2011).

In re Marriage of Witten, 672 N.W.2d 768 (Iowa 2003).

J.B. v. M.B. 783 A.2d 707 (N.J. 2001).

Jamison, Tracy. "Embryo Adoption and the Design of Human Nature: The Analogy Between Artificial Insemination and Artificial Impregnation." *The National Catholic Bioethics Quarterly* 10, no. 1 (Spring 2010): 111-22.

Jasper, Margaret C. *The Law of Adoption*. New York: Oxford University Press, 2008.

Johnson v. Calvert, 851 P.2d 776 (Ca. 1993).

Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

Keenan, James F. and Thomas R. Kopfensteiner. "The Principle of Cooperation: Theologians Explain Material and Formal Cooperation." *Health Progress* (April 1995): 23-27.

Kelly, David F. *Contemporary Catholic Health Care Ethics*. Washington, D.C.: Georgetown University Press, 2004.

Litowitz v. Litowitz, 48 P.3d 261 (Wash. 2002).

Louisiana Revised Statutes, sec. 9:123 (2011).

Louisiana Revised Statutes, sec. 9:130 (2011).

Mabry, Cynthia R. and Lisa Kelly. *Adoption Law: Theory, Policy, and Practice*. New York: William S. Hein & Company, 2010.

May, William E. *Catholic Bioethics and the Gift of Human Life*. Huntington, IN: Our Sunday Visitor, Inc., 2000.

Minnesota Annotated Statutes, sec. 609.2661 (2010).

Mississippi Laws, sec. 97-3-37 (West 2011).

Nightlight Christian Adoptions. www.nightlight.org/adoption-services/snowflakes-embryo (accessed March 23, 2011).

Ohio Revised Code Annotated, sec. 3111.97 (2011).

Oklahoma Statutes, ch. 10, sec. 566 (2010).

Pacholczyk, Tadeusz. "On the Moral Objectionability of Human Embryo Adoption." In *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, edited by Sarah-Vaughan Brakman and Darlene Fozard Weaver, 69-84. Springer Science + Business Media B.V., 2007.

Planned Parenthood v. Casey, 505 U.S. 833 (1992).

Pope John Paul II. *Familiaris Consortio*, The Christian Family in the Modern World. November 22, 1981. Vatican Website.
http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html.

Pope Paul VI. *Humanae Vitae*, Of Human Life. July 25, 1968. Vatican Website.
http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html.

Pope Pius XI. *Casti Connubii*, On Christian Marriage. December 31, 1930. Vatican Website.
http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_31121930_casti-connubii_en.html.

Roe v. Wade, 410 U.S. 113 (1973).

Roman v. Roman, 193 S.W.3d 40 (Tex. App. 2006).

Skinner v. Oklahoma, 316 U.S. 535 (1942).

South Eastern Center Against Sexual Assault. "Pregnancy Following Rape."
http://www.secasa.com.au/infosheet/infosheet_1003.pdf (accessed March 16, 2011).

Stanton v. Stanton, 100 S.E.2d 289 (Ga. 1957).

Stempsey, William E. "Heterologous Embryo Transfer: Metaphor and Morality." In *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, edited by Sarah-Vaughan Brakman and Darlene Fozard Weaver, 25-42. Springer Science + Business Media B.V., 2007.

Tollefsen, Christopher O. "Could Human Embryo Transfer Be Intrinsically Immoral?" In *The Ethics of Embryo Adoption and the Catholic Tradition: Moral Arguments, Economic Reality and Social Analysis*, edited by Sarah-Vaughan Brakman and Darlene Fozard Weaver, 85-102. Springer Science + Business Media B.V., 2007.

Uniform Parentage Act, sec. 807 (2002).

United States Conference of Catholic Bishops. *Ethical and Religious Directives for Catholic Health Care Services*, 5th ed. Washington, D.C.: USCCB, 2009.

Vatican.
http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_pro_14071997_en.html (accessed March 16, 2011).

West's Annotated California Penal Code, sec. 187 (2008).